DOCKET

No. 87-56-CFX
Status: GRANTED

Title: Javan Owens and Daniel G. Lessard, Petitioners
v.
Tom U. U. Okure

Docketed:
July 6, 1987

Court: United States Court of Appeals
for the Second Circuit

See also:

Counsel for petitioner: Sherwood,O. Peter

Counsel for respondent: Brennan,Joseph M., DeAngelis,Donald, Kimerling,Kenneth

Entry	Date	Note	Proceedings and Orders
1	Jul 6 1987	G	Petition for writ of certiorari filed.
2	Aug 12 1987		DISTRIBUTED. September 28, 1987
3	Sep 2 1987	F	Response requested -- JPS.
4	Sep 2 1987		Brief of respondent Tom U.U. Okure in opposition filed.
5	Oct 7 1987		REDISTRIBUTED. October 30, 1987
8	Mar 8 1988		REDISTRIBUTED. March 18, 1988
9	Mar 21 1988		Petition GRANTED.
			**********
11	Mar 24 1988		Order extending time to file brief of petitioner on the merits until May 26, 1988.
12	May 25 1988		Brief amici curiae of Nebraska, et al. filed.
13	May 26 1988		Joint appendix filed.
14	May 26 1988		Brief of petitioners Javan Owens, et al. filed.
15	May 26 1988		Brief amicus curiae of City of New York filed.
17	Jun 13 1988		Order extending time to file brief of respondent on the merits until July 15, 1988.
18	Jul 15 1988		Brief of respondent filed.
19	Jul 25 1988		CIRCULATED.
20	Aug 29 1988		Set for argument. Tuesday, November 1, 1988. (4th case) (1 hr).
21	Sep 28 1988	D	Motion of petitioners for leave to file a reply brief, out-of-time filed.
22	Oct 3 1988		DISTRIBUTED. October 7, 1988. (Motion of petitioners to file reply brief out-of-time).
23	Oct 11 1988		Motion of petitioners for leave to file a reply brief, out-of-time DENIED.
24	Nov 1 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87 - 56

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAVAN OWENS and DANIEL G. LESSARD,

Petitioners,

– against –

TOM U.U. OKURE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway – 25th Floor
New York, New York 10271
(212) 341-2020

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General
CHARLES R. FRASER
Assistant Attorney General
Of Counsel

QUESTION PRESENTED

Whether this Court's analysis in *Wilson v. Garcia*, 471 U.S. 261 (1985), requires that, where state law provides different statutes of limitations for intentional and unintentional personal injury actions, the statute of limitations for intentional personal injury actions be borrowed for a civil rights suit under 42 U.S.C. § 1983?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAVAN OWENS and DANIEL G. LESSARD,

Petitioners,

– against –

TOM U.U. OKURE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Attorney General of the State of New York, on behalf of Javan Owens and Daniel G. Lessard, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this action.

OPINIONS BELOW

The opinions of the lower courts are reported as *Okure v. Owens*, 625 F. Supp. 1568 (N.D.N.Y. 1986), *aff'd*, 816 F.2d 45 (2d Cir. 1987). These opinions are reproduced in the appendix hereto.

JURISDICTION

The order of the Court of Appeals was entered on April 6, 1987. This petition is filed pursuant to 28 U.S.C. §§ 1254(1), 2101(c).

STATUTES INVOLVED

42 U.S.C. § 1983 states in part:

> *Civil action for deprivation of rights*
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1988 states in part:

> *Proceedings in vindication of civil rights*
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title CIVIL RIGHTS, and of Title CRIMES, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

New York Civil Practice Law and Rules § 214 states in part:

> *Actions to be commenced within three years: for non-payment of money collected on execution; for penalty*

> *created by statute; to recover chattel; for injury to property; for personal injury; for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud*
>
> The following actions must be commenced within three years:
>
> * * *
>
> 5. an action to recover damages for a personal injury except as provided in sections 214-b and 215. . . .

New York Civil Practice Law and Rules § 215 states in part:

> *Actions to be commenced within one year: against sheriff, coroner or constable; for escape of prisoner; for assault, battery, false imprisonment, malicious prosecution, libel or slander; for violation of right of privacy; for penalty given to informer; on arbitration award*
>
> The following actions shall be commenced within one year:
>
> * * *
>
> 3. an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law. . . .

STATEMENT OF THE CASE

Respondent alleges that he suffered various minor injuries during an arrest by petitioners, who are campus police officers for the State University of New York. Respondent filed suit pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, on November 13, 1985, nearly twenty-two months after the events at issue.

Petitioners moved to dismiss, relying on New York's one-year statute of limitations for intentional personal injury torts. Respondent argued for resort to New York's three-year limitation applicable to unintentional personal injury. The District Judge denied petitioners' motion, but certified an interlocutory appeal, which the Court of Appeals accepted.

A divided panel of the Court of Appeals affirmed the denial of the motion to dismiss. The majority conceded that § 1983 "violations are typically, and perhaps necessarily, intentional" (A-5[1]), and did not dispute that New York's one-year statute of limitations is construed by New York courts to apply generally to intentional personal injuries. (*See* A-5—A-6.) Nonetheless, the Court of Appeals relied on the "plain structure of the New York statutes" (A-5), under which the three-year limitation applies to personal injury "except as provided" in the intentional personal injury statute of limitations. N.Y.C.P.L.R. § 214(5). The majority held that this linguistic structure rendered the intentional injury statute "exceptional" and the unintentional injury statute "general" (A-6), and that this Court's decision in *Wilson v. Garcia*, 471 U.S. 261, 280 (1985), requires resort to a state's "general" personal injury statute of limitations.

The majority went on to hold that "the three-year limit . . . more faithfully represents the federal interest in providing an effective remedy for violations of civil rights than does the restrictive one-year limit. . . . " (A-7.)

The dissent rejected the majority's exclusive reliance on the linguistic structure of New York's limitations scheme, instead relying on New York courts' construction of the limitations provisions. (A-8—A-10.) Then, citing legislative history of § 1983, as well as this Court's constructions of § 1983, the dissent found "no room for disagreement that section 1983 originally was directed at acts of deliberate wrongdoing and that, even today, it is relied upon almost invariably as a safeguard against the intentional deprivation of civil rights." (A-11.) Therefore,

[1] Citations preceded by "A" refer to pages in the appendix hereto.

the dissent concluded, the Supreme Court's "clear direction that we are to select the state limitation period that is most analogous to the elements of the section 1983 cause of action" requires selection of New York's intentional personal injury statute of limitations. (A-13.)

The dissent also rejected the majority's desire to select the longer of the statutes available and cited substantial and uncontradicted authority for the proposition that a one-year limitation does not impermissibly limit a civil rights plaintiff's access to judicial redress. (A-14.)

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals Conflicts With the Decisions of Three Other Courts of Appeals and With This Court's Direction to Borrow the Most Nearly Analogous State Statute of Limitations for § 1983 Claims.

(1)

Selection of limitations periods for claims under 42 U.S.C. § 1983 has long been a subject of "conflict, confusion, and uncertainty." *Wilson v. Garcia*, 471 U.S. at 266; *see Garcia v. Wilson*, 731 F.2d 640, 643-49 (10th Cir. 1984) (en banc). This Court resolved most of that conflict in *Wilson v. Garcia* by holding that § 1983 claims are subject to state statutes of limitations governing "tort claims for personal injury." 471 U.S. at 277.

The Court in *Wilson* did not address the question of the choice between "*two* periods that govern various injuries to personal rights." 471 U.S. at 286 (O'Connor, J., dissenting). In particular, this case presents the question whether § 1983 claims are governed by intentional personal injury limitations or unintentional personal injury limitations in those states that so distinguish their limitations periods.[2]

[2] A review of state statutes of limitations suggests that twenty-six states plus the District of Columbia distinguish for limitations purposes between all or most intentional personal injuries and all or most unintentional personal injuries. Those states are Alabama, Arizona, Arkansas, Colorado, Connecticut, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming.

The holding below, that New York's unintentional personal injury limitations period applies to § 1983 claims, is squarely in conflict with the holdings of three other Courts of Appeals since *Wilson v. Garcia*. *See e.g.*, *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986); *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986); *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986). This square conflict among the Circuits in interpretation of a major decision of this Court raises questions of national import "that are not likely to disappear without guidance from this Court." *Mulligan v. Hazard*, 106 S. Ct. at 2903 (White, J., dissenting from denial of certiorari).[3]

This case appears to be the first to present a square conflict on this issue to this Court.[4]

---

[3] In two decisions before *Wilson v. Garcia*, the Tenth Circuit had applied unintentional tort limitations periods to § 1983 claims. *Hamilton v. City of Overton Park*, 730 F.2d 613 (10th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1052 (1985), and *Mishmash v. Murray City*, 730 F.2d 1366 (10th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1052 (1985). Both of these cases were pending below, so that the lower courts were free to re-examine their conclusions in light of this Court's intervening decision in *Wilson v. Garcia*.

[4] In a post-*Wilson* case, a divided panel of the District of Columbia Circuit said in dictum that that Court would probably select the District of Columbia's unintentional tort statute of limitations. *Banks v. Chesapeake and Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986). In another post-*Wilson* case, *Small v. Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986), the First Circuit distinguished *Jones v. Preuit & Mauldin*, 763 F.2d 1250, and *Gates v. Spinks*, 771 F.2d 916, and construed Maine law to provide no clear separation of intentional and unintentional personal injury torts. Certiorari was sought in neither *Small* nor *Banks*.

The decision below came after papers were filed in *Jones v. Shankland*, 800 F.2d 77 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 2177 (1987), and after decision in *Carroll v. Wilkerson*, 782 F.2d 44 (6th Cir.), *cert. denied*, 107 S. Ct. 330 (1986), so that the inter-Circuit conflict created by the decision below was not presented to this Court in those cases. Moreover, although the Sixth Circuit's decision in *Carroll v. Wilkerson* could be construed to conflict with the prior Sixth Circuit decision in *Mulligan v. Hazard*, the Court in *Carroll* in fact expressly purported to follow *Mulligan*. *Compare Carroll v. Wilkerson*, 782 F.2d at 45, *with id.*, 107 S. Ct. at 330 (White, J., dissenting from denial of certiorari). Given this uncertain import of the Sixth Circuit holdings, this petition is the first to present a clear post-*Wilson* on this issue to this Court.

(2)

Petitioners submit that the majority below misapprehended this Court's teaching in *Wilson v. Garcia*.

There, the Court held that federal policies favoring "uniformity, certainty, and the minimization of unnecessary litigation" require that for each state, one statute of limitations should control *all* § 1983 claims in the federal and state courts of that state. 471 U.S. at 275. Furthermore, the Court's repeated references to the legislative history and purpose of § 1983, 471 U.S. at 274-75, 276-77, 278, 279, make clear that the Court contemplated selection of state limitations periods by analogy to § 1983 actions as foreseen by Congress in enacting § 1983, not by analogy to "the wide diversity of claims" that § 1983 has come to embrace. 471 U.S. at 275.

Based on legislative history, the Court held that "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort," 471 U.S. at 277, specifically "injury to the individual rights of the person." *Id.* "Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.* The Court also rejected state limitations periods applicable to statutory claims, based on "[t]he relative scarcity of statutory claims when § 1983 was enacted." 471 U.S. at 278. Finally, the Court rejected an analogy to state remedies for wrongs committed by public officials, on the ground that "Congress would not have [so] characterized § 1983 . . . . " 471 U.S. at 279.

Once it was determined that Congress in 1871 would have found § 1983 claims to be most nearly analogous "to tort claims for personal injury," 471 U.S. at 277, the choice from New Mexico statutes of limitations was clear: New Mexico, like many states, has only one personal injury tort statute of limitations. New York, however, distinguishes for limitations purposes between intentional and unintentional personal injury. New York's C.P.L.R. § 214(5) applies a three-year limitation to "personal injury except as provided in sections 214-b and 215."

N.Y.C.P.L.R. § 215(3) applies a one-year limitation to "assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy. . . . "

The enumeration in N.Y.C.P.L.R. § 215(3) includes the principal intentional injuries to personal and quasi-personal rights. As Judge Van Graafeiland discussed in detail, N.Y.C.P.L.R. § 215(3) also applies to most if not all intentional personal injuries that are not enumerated (A-9 – A-10), and neither the majority in the Court of Appeals nor the respondent suggested otherwise.

Although this Court in *Wilson v. Garcia* was not presented with a choice between intentional and unintentional personal injury limitations periods, the rationale of *Wilson* requires selection of New York's intentional personal injury tort statute. The Court relied heavily on the legislative purpose of § 1983, showing that "The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." 471 U.S. at 276 (footnote omitted). *See Briscoe v. LaHue*, 460 U.S. 325, 337 (1983) ("During the debates, supporters of the bill repeatedly described the reign of terror imposed by the Klan. . . . Hours of oratory were devoted to the details of Klan outrages – arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation – often committed in disguise and under cover of night").

The criminal "atrocities" described by the Court and in the Congressional minutes are not analogous at all to unintentional torts, or accidents. The malicious conduct and pervasive conspiracy which motivated the Congress in 1871 to enact § 1983 resulted in grievous, deliberate injuries that could only be regarded as analogous to *intentional* torts.

Although the scope of § 1983 has broadened well beyond that foreseen by Congress in 1871, *Wilson v. Garcia*, 471 U.S. at 275, it is still the case that the typical § 1983 claim must be

founded on more than mere negligence. For instance, Eighth Amendment claims required proof of "wanton" and "deliberate indifference to . . . serious illness or injury." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976); *Whitley v. Albers*, 475 U.S. 312 (1986) (Eighth Amendment prohibits physical force imposed "maliciously and sadistically for the very purpose of causing harm"). Due process claims require at least proof of reckless misconduct, *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986), and equal protection claims require discriminatory intent or purpose. *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Therefore, regardless whether this Court looks to the original purpose of § 1983 or to its application today, the fact is that state law intentional tort claims are more closely analogous to § 1983 claims than are unintentional tort claims. Three Courts of Appeals since *Wilson* have so held, *see supra* at 6, and the majority below offered no basis to conclude that those courts' analysis of and reliance on the legislative history of § 1983 was erroneous.[5]

---

[5] The majority's preference for New York's unintentional tort limitations period on the ground that that period is longer than New York's intentional tort limitations period is analytically unsound, and conflicts with holdings of several Circuits and with statements of this Court. This Court has warned that the balance of the important competing interests relevant to the drawing of limitations schemes is a state legislative not a federal judicial function. *See Wilson v. Garcia*, 471 U.S. at 271.

This Court has also indicated that "[i]t is most unlikely that the period of limitations [for personal injury tort actions] . . . ever was, or ever would be, fixed in a way that would be inconsistent with federal law in any respect." *Wilson v. Garcia*, 471 U.S. at 279. In so doing, this Court was surely aware of its prior cases applying one-year tort statutes of limitations to § 1983 claims. *See Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (Puerto Rico); *Chardon v. Fernandez*, 454 U.S. 6 (1981) (same); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (Tennessee); *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (Louisiana). *See also Washington v. Breaux*, 782 F.2d 553 (5th Cir. 1986) (Louisiana); *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 928 (1987) (California); *Mulligan v. Hazard*, 777 F.2d 340 (Ohio); *Gates v. Spinks*, 771 F.2d 916 (Mississippi); *Altair Corp. v.*

(Footnote Continued)

CONCLUSION

Since intentional tort claims are manifestly more nearly analogous to § 1983 claims than are negligence and strict liability tort claims and since New York's one-year intentional personal injury tort limitations period does not deny prospective civil rights plaintiffs meaningful recourse to the courts, New York's one-year limitations period must apply to this § 1983 suit. Since the Circuits are now squarely in conflict over the choice between state limitations for intentional and unintentional personal injury torts, this Court should grant this petition to resolve the issue.

Dated: New York, New York
July 6, 1987

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway – 25th Floor
New York, New York 10271
(212) 341-2020

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General
CHARLES R. FRASER
Assistant Attorney General
Of Counsel

Pesquera DeBusquets, 769 F.2d 30 (1st Cir. 1985) (Puerto Rico); *Burkhardt v. Randles*, 764 F.2d 1196 (6th Cir. 1985) (Tennessee); *Fowler v. City of Louisville*, 625 F. Supp. 181 (W.D. Ky. 1985), *aff'd without op.*, 803 F.2d 719 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1375 (1987) (Kentucky). *Cf. Mohasco Corp. v. Silver*, 447 U.S. 807, 818 & n.21 (1980) (Title VII limitation of 300 days); 42 U.S.C. § 1986 (one-year limitation); *Burnett v. Grattan*, 468 U.S. 42 (1984) (under 42 U.S.C. § 1988, 6-month limitation is too short for § 1983 claims).

APPENDIX

JUDGMENT AND OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Argued Sept. 25, 1986 Decided April 6, 1987

Docket No. 86-7343

TOM U.U. OKURE,

Plaintiff-Appellee,

v.

JAVAN OWENS and DANIEL G. LESSARD,

Defendants-Appellants.

Before: VAN GRAAFEILAND, MESKILL and NEWMAN, *Circuit Judges.*

Interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a) from denial of motion to dismiss as time barred section 1983 action against University police officers in the United States District Court for the Northern District of New York, McCurn, *J.* Held that: (1) characterization of section 1983 claims for the purpose of selecting an appropriate statute of limitations is a matter of federal law; (2) the single New York statute most analogous to the broad range of possible section 1983 claims is N.Y. C.P.L.R. § 214(5), which provides a three year statute of limitations for general personal injuries sounding in tort.

Affirmed. Judge Van Graafeiland dissents in a separate opinion.

Charles R. Fraser, Asst. Atty. Gen., State of N.Y., New York City (Robert Abrams, Atty. Gen. of the State of N.Y., Peter H. Schiff, Deputy Sol. Gen., Howard L. Zwickel, Chief, Litigation Bureau, Judith T. Kramer, Asst. Atty. Gen., State of N.Y., New York City, of counsel), for defendants-appellants.

Joseph M. Brennan, Albany, N.Y. (Stephen J. Rehfuss, Sullivan, Rehfuss, Cunningham & Brennan, Albany, N.Y., of counsel), for plaintiff-appellee.

Burt Neuborne, Jack D. Novick, American Civil Liberties Union Foundation, New York City; Steven Shapiro, New York Civil Liberties Union, New York City; Linda Flores, Kenneth Kimerling, Puerto Rican Legal Defense & Educ. Fund, Inc., New York City, of counsel, for amici curiae of the Puerto Rican Legal Defense & Educ. Fund, The American Civil Liberties Union and The New York Civil Liberties Union.

Frederick A.O. Schwarz, Jr., Corp. Counsel of the City of New York, John Woods, Donna Hill, Ellen Henak, Nora Freeman, Edward F.X. Hart, Office of the Corp. Counsel of the City of New York, New York City, of counsel, for amicus curiae City of New York.

MESKILL, Circuit Judge:

The plaintiff complained in the United States District Court for the Northern District of New York that defendants Owen and Lessard, State University of New York police officers, battered and beat him during an arrest on the SUNY campus in Albany. *Okure v. Owens*, 625 F.Supp 1568 (N.D.N.Y.1986). The arrest and alleged beating took place on January 27, 1984, and this civil rights action brought pursuant to 42 U.S.C. § 1983 (1982) was filed twenty-two months later. The defendants moved to dismiss the complaint as barred by the claimed applicable one year New York statute of limitations, N.Y.C.P.L.R. § 215(3)

(McKinney 1972),[1] Upon denial of the motion by Judge McCurn, we permitted this interlocutory appeal, taken pursuant to 28 U.S.C. § 1292(b) (1982) and Fed.R.App.P. 5(a). We agree with the district court and all parties that the choice of New York statutes of limitations established in *Pauk v. Board of Trustees of the City University of New York*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), is no longer appropriate in light of the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985). We agree with the district court, and with the plaintiff, that the proper limitation to apply to all section 1983 claims in New York is three years, based on the state's general personal injury statute, N.Y.C.P.L.R. § 214(5).[2] Accordingly, we affirm.

DISCUSSION

In *Wilson v. Garcia*, the Supreme Court decided that federal law governs selection of a statute of limitations for application to section 1983 claims and that a single limitations period in each state is to be selected from among existing statutes of limitations. *Wilson* characterizes section 1983 claims as general personal injury actions sounding in tort and bids us to select a limitations period in accord with that view.

The *Wilson* Court first reviewed 42 U.S.C. § 1988, which directs the application of common law and state statutes to fill

---

[1] The following actions shall be commenced within one year:

. . . .

3. an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law.

N.Y.C.P.L.R. § 215 (McKinney 1972).

[2] The following actions must be commenced within three years:

. . . .

5. an action to recover damages for a personal injury except as provided in sections 214-b and 215.

N.Y.C.P.L.R. § 214 (McKinney Supp. 1986).

gaps in the structure of federal civil rights legislation. 471 U.S. 267-69 & nn. 13 &16. It concluded, as we did in *Pauk*, 654 F.2d at 865-66, that the characterization of section 1983 claims for statute of limitations purposes is a matter of federal law and that only the length of the limitation period is governed by state law. *Wilson*, 471 U.S. at 269. Once the state legislature has applied state standards to choose limitation periods for various causes of action, the courts must apply federal principles to choose the cause of action most appropriate to the governance of section 1983 claims. *Id.* at 269-70.

The Court next decided that the choice of a limitations period should be singular and applied uniformly in order to approximate, though imperfectly, the numerous and diverse claims catalogued under section 1983. *Id.* at 272-73. It rejected *ad hoc* selection of a particular statute of limitations to correspond to the gravamen of each individual section 1983 complaint, because such tailoring would be contrary to the imputed congressional preference for uniformity, simplicity and certainty. *Id.* at 273-75. Having concluded that section 1988 "is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims," *id.* at 275, the Court went on to explore the range of available statutes.

The Court found it unlikely that the Forty-Second Congress in adopting section 1983 intended to apply either a catchall period of limitations for claims based on violations of statutory rights or a period designed to limit actions for wrongs committed by state officials. *Id.* Rather, the Court looked to the circumstances in 1871 surrounding passage of section 1983 and decided that Congress was most directly interested in restoring peace and justice to the postbellum South. The Court noted that the section 1983 remedy, initially directed at the tortious atrocities committed by the Ku Klux Klan, today has evolved to encompass "a broad range of potential tort analogies, from injuries to property to infringements of individual liberty." *Id.* It concluded that both the nature of the section 1983 remedy

and the federal interest in ensuring that the state limitations period not discriminate against that remedy demand characterization of all section 1983 claims as general personal injury actions, sounding in tort. *Id.* at 280.

1. *The Nature of the Section 1983 Remedy*

The issue crisply presented here is what limitations period *Wilson* commands for section 1983 actions where the forum state has two statutes of limitations governing personal injury claims. The defendants have argued forcefully that the Forty-Second Congress and the *Wilson* Court would find the proper analog of section 1983 claims to be claims for intentionally inflicted personal injuries. Taking their lead from the Supreme Court's retrospective survey of the Ku Klux Klan's purposeful campaign to deny "decent citizens their civil and political rights," 471 U.S. at 276, the defendants urge the conclusion that the archetypal section 1983 claim is the intentional tort, whose limitations period is provided in New York by N.Y.C.P.L.R. § 215(3). *See Trott v. Merit Dep't Stores*, 106 A.D.2d 158, 484 N.Y.S.2d 827, 829 (1st Dep't 1985).

Even though civil rights violations are typically, and perhaps necessarily, intentional, that characterization is not controlling. We believe that the *Wilson* Court's choice of the term "general" to describe personal injury torts analogous to section 1983 claims was neither casual nor superfluous. Rather, we read therein a command that our choice of statute of limitations from New York law be expansive enough to accommodate the diverse personal injury torts that section 1983 has come to embrace so as not to exclude claims that stray from a precisely drawn analogy.

The defendants argue that the intentional torts addressed by the one year limitation in N.Y.C.P.L.R. § 215(3) are just as general as those addressed by the three year limitation of N.Y.C.P.L.R. § 214(5), which the defendants characterize as unintentional. Reply Br. of Appellants at 3. However, we cannot ignore the plain structure of the New York statutes which

gives plaintiffs three years to commence "an action to recover damages for a personal injury except [section 215(3), which provides one year for] an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the [statutory] right of privacy. . . ." N.Y.C.P.L.R. §§ 214(5), 215(3). By nature, section 214(5) is general; section 215(3) is more specific and exceptional. This dichotomy survives no matter how many similar intentional torts are judicially added to those enumerated in section 215(3).

Wilson instructs us to look beyond the nature of the section 1983 claim to the federal interest in ensuring that the borrowed period of limitations not discriminate against the federal claim. 471 U.S. at 276. Having been guided in this case to the general personal injury action of N.Y.C.P.L.R. § 214(5) as fairly analogous by nature to the section 1983 claim, we turn to the federal interest.

2. *The Federal Interest*

The *Wilson* Court has already eliminated the most likely sources of discrimination by rejecting limitations designed to protect state officials and limitations associated with privileges extended to the people by state legislatures. 471 U.S. at 279. Proper consideration of the federal interest moves us also to ensure that the limitations period of section 214(5) is long enough to effectuate the policies embedded in section 1983.

We are not persuaded that because personal injuries actionable under section 1983 are typically intentional, they are necessarily apparent to the victim at the time they are inflicted. Many injuries to personal rights are less visible than the simple battery alleged here. We need only consider the examples of valid section 1983 claims catalogued in *Wilson:* impermissible demands for loyalty oaths, restraints on freedom of speech or association and bans on interracial marriage are injuries to personal rights in which the tortious nature may not be immediate obvious. *See* 471 U.S. at 273-74 n. 31.

Even where the injury itself is obvious, the constitutional dimensions of the tort may not be. This situation might arise where it is unclear that the tortfeasor acted under color of state law or that the act was illegal. It may be that the legality of the act complained of has not previously been adjudicated.[1] Because recognition problems such as these are endemic in section 1983 litigation, we believe that there must be time for plaintiffs to reflect and to probe. The three year period of limitations provided by N.Y.C.P.L.R. § 214(5) accommodates the many complex section 1983 claims.

CONCLUSION

New York has determined that the rights of its citizens as plaintiffs and defendants in personal injury tort actions are properly balanced by applying a three year statute of limitations to all claims other than those enumerated in section 215(3). We conclude that section 214(5) is the general personal injury statute most analogous to section 1983 claims. Further, the three year limit of section 214(5) more faithfully represents the federal interest in providing an effective remedy for violations of civil rights than does the restrictive one year limit of section 215(3).

---

[1] Judge Van Graafeiland in his dissenting opinion suggests that we rejected this argument in *Fiesel v. Board of Education of the City of New York*, 675 F.2d 522 (2d Cir. 1982). In selecting an appropriate statute of limitations here, we are not abandoning *Fiesel*, in which we held that a valid limitations period is not disturbed by later shifts in controlling law. *Id.* at 524-25. There, a plaintiff alleging constitutional torts by a municipal body claimed that she had been prevented from timely asserting her section 1983 claim by *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part, Monell v. Department of Social Services*, 436 U.S. 658 (1978), which provided municipalities with immunity from such actions. Fiesel had promptly recognized her injury and its constitutional dimensions, but elected not to risk the legal expense of arguing that *Monroe* should be overruled. When the Supreme Court subsequently held in *Monell* that municipalities were no longer immune from suit under section 1983, the limitations period for Fiesel's claim had long since expired. Fiesel did not argue that she was prejudiced by the brevity of the statutory period, but rather that *no* statute of limitations could begin to run until the law changed in a way that was favorable to her cause of action.

The order denying the motion to dismiss is affirmed.

VAN GRAAFEILAND, Circuit Judge, dissenting:

In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court held that the statute of limitation for all section 1983 claims must be borrowed from state law governing "the tort action for the recovery of damages for personal injuries." *Id.* at 276. The application of that rule posed no difficulty in *Wilson*, since the New Mexico statutes there under consideration supplied only one period of limitation for all actions of this kind. As Justice O'Connor correctly observed in her dissenting opinion, however, the *Wilson* rule provides no clear guidance for selecting a statute of limitation in States such as New York, which "def[y] the newly minted rule by supplying not one but *two* periods that govern various injuries to personal rights." *Id.* at 286. Accordingly, in selecting between New York's two limitation periods, this Court must follow the settled federal practice of borrowing the most analogous statue which is not inconsistent with the Constitution and laws of the United States. *Id.* at 267-68. *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984); 42 U.S.C. § 1988.

In order to select the most analogous New York statute, it is necessary, of course, to understand the nature of the New York limitation scheme. The New York Civil Practice Law and Rules ("CPLR") allows one year to bring an action to recover damages for those personal injuries covered by CPLR § 215(3), and three years for other personal injury actions under CPLR § 214(5). In explaining his refusal to adopt the one-year limitation for section 1983 claims, the district judge asserted that section 215(3) was a narrowly drawn statute applicable only to certain specific intentional torts. 625 F.Supp. 1568, 1570-71. This misconceives the scope of that section.

Section 215(3) prescribes a one-year limitation period for eight intentional torts: assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, and a violation of the statutory right of privacy, a list that is

broad enough to include almost all of the intentional personal injuries recognized at common law. *See Trayer v. State*, 90 A.D.2d 263, 268 (1982). *See also Gates v. Spinks*, 771 F.2d 916, 919 (5th Cir.1985), *cert. denied*, 106 S.Ct. 1378 (1986). That feature of the statute is no coincidence. The legislative history of section 215(3) reveals that the actions which it lists were subjected to a shorter period of limitation because they "involve torts of an intentional character, and the effect of their perpetration is known promptly to the person injured." *Second Preliminary Report of the Advisory Committee on Practice and Procedure*, Leg.Doc. No. 13, at 537-38 (1958).

In addition, it is now clear that the one-year period for intentional torts is not limited to the eight intentional injuries specifically mentioned in section 215(3). In determining the appropriate statute of limitation, the New York courts "look for the reality, and the essence of the action and not its mere name." *Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453, 459 (1967) (quoting *Brick v. Cohn-Hall-Marx Co.*, 276 N.Y. 259, 264 (1937)). Thus, in *Schulman v. Krumholz*, 81 A.D.2d 883, (1981) (*mem.*), the court reasoned that a cause of action for tortious harassment was in the nature of an intentional tort, and therefore was subject to "the one-year Statute of Limitations applicable to intentional torts." *Id.* at 883. Other New York courts have followed the same reasoning in applying section 215(3) to unlisted intentional injuries such as abuse of process, *Hansen v. Petrone*, 124 A.D.2d 782 (1986) (*mem.*), and the intentional infliction of emotional distress, *id; Parker v. Port Authority of New York and New Jersey*, 113 A.D.2d 763 (1985) (*mem.*); *Weisman v. Weisman*, 108 A.D.2d 852 (1985) (*mem.*); *Goldner v. Sullivan, Gough, Skipworth, Summers and Smith*, 105 A.D.2d 1149 (1984) (*mem.*). Section 215(3) has been given a similar expansive construction by federal district courts. *See Koster v. Chase Manhattan Bank, N.A.*, 609 F.Supp. 1191, 1198 (S.D.N.Y.1985); *Rio v. Presbyterian Hosp. in City of New York*, 561 F.Supp. 325, 328 (S.D.N.Y.1983); *Pratt v. Bernstein*, 533 F.Supp. 110, 117-18 (S.D.N.Y.1981).

Scholars, too, generally identify section 214 as the one which governs unintentional torts and section 215 as the statute for

intentional torts. *See, e.g.*, Siegel, *New York Practice*, at 37 (1978); 2 Carmody-Wait 2d § 13.74 at 419; 35 N.Y.Jur. § 35 at 527. In the words of District Judge Joseph McLaughlin, an authoritative commentator on the CPLR:

> What distinguishes the torts governed by [CPLR 215(3)] from those governed by CPLR 214(5) is an intent by the defendant to inflict consequences upon the plaintiff. CPLR 214(5) governs negligence actions, generally those where the defendant does not inten[d] to affect the plaintiff.

Practice Commentaries on New York CPLR at 308 (McKinney 1987 Supp.). A similar generalized characterization is also made quite routinely by the New York courts, which describe section 214 as "the three-year negligence Statute of Limitations", *Trott v. Merit Dep't Store*, 106 A.D.2d 158, 159 (1985), and section 215 as "the governing Statute of Limitations for intentional torts," *Wheeler v. State of New York*, 104 A.D.2d 496, 498 (1984) (*mem.*). *Accord Rosner v. Maimonides Hosp.*, 77 A.D.2d 652 (1980) (*mem.*); *Castracani v. Mahoney*, 132 Misc.2d 276 (1986). In view of the foregoing, the district court erred in characterizing section 214 as a general rule governing most personal injury actions and section 215 as a narrow exception, confined to a few of the intentional torts. On the contrary, the two limitation periods actually operate to allow one year for almost every intentional injury to the person, and three years for virtually every unintentional personal injury.

Although the selection of proper limitation periods has always been a troublesome problem for the courts, a choice for section 1983 cases, made on an intentional rather than unintentional personal injury basis, is both accurate and simple in application. The legislative history of section 1983 reveals that the enactment of the Civil Rights Act in 1871 was motivated primarily by congressional concern over the "campaign of violence and deception in the South, formented by the Ku Klux Klan," which was depriving citizens of their civil rights through murder and

other acts of physical violence. *Wilson v. Garcia*, 471 U.S. at 276, 279. Even today, the vast majority of civil rights actions under section 1983 involve intentional, rather than unintentional, deprivations of constitutional rights. Of all the nearly three dozen landmark cases cited in *Wilson v. Garcia*, 471 U.S. at 273-74, and Justice Blackmun's law review article, 60 N.Y.U.L.Rev. 1 (1985), cited in *Wilson* at 274 n. 31, not one successfully challenged the legality of an unintentional or negligent act.

In *Daniels v. Williams*, 106 S.Ct. 662 (1986), the Supreme Court recently held that mere negligence never can establish a violation of the due process clause – the clause under which the overwhelming majority of section 1983 actions are brought. Mere negligence also has been found insufficient to establish a section 1983 claim in other frequently litigated constitutional areas. *See Whitley v. Albers*, 106 S.Ct. 1078 (1986) (cruel and unusual punishment); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (equal protection).

In sum, there simply is no room for disagreement that section 1983 originally was directed at acts of deliberate wrongdoing and that, even today, it is relied upon almost invariably as a safeguard against the intentional deprivation of civil rights. For this reason, I cast my lot with those Courts of Appeals which hold that state limitation periods governing essentially all intentional personal injuries are better analogized to section 1983 claims than limitation periods confined almost entirely to unintentional torts. *See, e.g., Mulligan v. Hazard*, 777 F.2d 340 (6th Cir.1985), *cert. denied*, 106 S.Ct. 2902 (1986); *Gates v. Spinks*, 771 F.2d 916 (5th Cir.1985), *cert. denied*, 106 S.Ct. 1378, (1986); *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir.1985), *cert. denied*, 106 S.Ct. 893 (1986). A number of district courts have done the same, *e.g., Chris N. v. Burnsville*, 634 F.Supp. 1402 (D.Minn.1986), including several within this Circuit, *DiVerniero v. Murphy*, 635 F.Supp. 1531 (D. Conn.

1986); *Weber v. Amendola*, 635 F.Supp. 1527 (D.Conn.1985) *Green v. Coughlin*, 633 F.Supp. 1166 (S.D. N.Y.1986); *Saunders v. State of New York*, 629 F.Supp. 1067 (N.D.N.Y.1986).

My colleagues believe, however, that the New York negligence statute of limitations is the better analogy for section 1983 claims because of "the plain structure of the New York statutes" which have styled the intentional limitation period as an exception to the period for unintentional injuries. My colleagues reason, as did the district court, that section 214(5) must be selected as the better analogy in view of the Supreme Court's characterization of section 1983 claims as "[g]eneral personal injury actions, sounding in tort." *Wilson v. Garcia*, 471 U.S. at 279. Although the New York Court of Appeals has not squarely addressed the merits of the issue, it appears that it would reach the same conclusion. *See 423 South Salina Street, Inc. v. City of Syracuse*, 68 N.Y.2d 474 (1986). I do not agree.

I do not believe that the *Wilson* Court's choice of the term "general" to describe personal injury torts analogous to section 1983 claims was intended to control the choice now before us. Such reasoning places too much weight on a single word and loses sight of the Supreme Court's reminder that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). The analogy of section 1983 claims to "general personal injury actions" is found in the middle of a paragraph explaining the basis for the Court's rejection of the New Mexico Tort Claims Act as the proper analogy. The context of the passage unmistakably reveals that the Court used the term "general" personal injury actions simply to distinguish those actions from suits against public officials. *See Burroughs v. Holiday Inn*, 621 F.Supp. 351, 352-53 (W.D.N.Y.1985). When the term "general personal injury actions" is used in this manner, section 215(3) fits the description better in 1983 cases than section 214(5), because section 215(3) includes almost all of the traditional personal injury torts.

I believe my colleagues place undue emphasis on the "plain structure" of the New York statutes. Their reasoning is not supported by the Supreme Court's passing reference to "general personal injury actions," and is in fact inconsistent with the Court's clear direction that we are to select the state limitation period that is most analogous to the elements of the section 1983 cause of action and to the congressional purpose in enacating that statute. *Wilson v. Garcia*, 471 U.S. at 268. Section 215(3) most nearly meets those requirements.

As an alternative basis for their holding, my colleagues conclude that the three-year period for unintentional torts "more faithfully represents the federal interest in providing an effective remedy for violations of civil rights than does the restrictive one-year limit" for intentional torts. This misconceives our role in borrowing state law under section 1988, by suggesting that we are to select the statute which gives the broadest protection to the federal interest in providing a remedy for civil rights violations. The federal interest in favor of protecting civil rights claims must be balanced against, and is at some point outweighed by, the federal interest in prohibiting the prosecution of stale claims. *Wilson v. Garcia*, 471 U.S. at 271. *See also Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980). As the Supreme Court has observed in the context of qualified immunity, federal rules of decision for section 1983 actions must be fashioned with an eye toward "the balance . . . between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). It is overly simplistic to suggest that the protection of constitutional rights is the only interest at stake in this case, or that we must select the statute which best promotes that single interest. That approach has been repeatedly rejected by the Supreme Court, which has observed:

> A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were

> the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant.

Board of Regents v. Tomanio, *supra*, 446 U.S. at 488 (quoting *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978)). If section 215(3) is the most analogous New York statute for 1983 claims, we must look to that statute, so long as it is not so short as to be inconsistent with the federal policy favoring enforcement of civil rights.

The only section of the Reconstruction Civil Rights Act which contains a statute of limitation, 42 U.S.C. § 1986, allows only one year in which to bring an action for damages against anyone who knowingly fails to prevent a conspiracy to violate another's right to equal protection. As three concurring Justices reasoned in *Burnett v. Grattan*, *supra*, 468 U.S. at 61, section 1986 demonstrates a congressional determination that a one-year limitation period affords a reasonable time for the commencement of a civil rights action. This view is shared by the Courts of Appeals from other Circuits, which have shown no hesitation since *Wilson v. Garcia* in borrowing one-year personal injury limitations for section 1983 actions. *Walker v. City of Bowling Green*, 803 F.2d 722 (6th Cir.1986) (unpublished opinion); *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir.1986); *Berndt v. State of Tennessee*, 796 F.2d 879, 883 (6th Cir.1986); *Bunch v. Bullard*, 795 F.2d 384, 388 n. 2 (5th Cir.1986); *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1456 (9th Cir.1986); *Washington v. Breaux*, 782 F.2d 553, 554 n. 1 (5th Cir.1986) (per curiam); *Altair Corp. v. Pesquera de Busquets*, 769 F.2d 30, 31-32 (1st Cir.1985). No Court of Appeals confronting this issue since *Wilson* has held that a one-year personal injury limitation period would be inherently too short.

Differing from the consensus in other Circuits, my colleagues conclude, for reasons that I find entirely unpersuasive, that federal policy requires a period of more than one year for section 1983 plaintiffs "to reflect and to probe". Unlike my

colleagues, I do not believe that any more than a tiny fraction of the victims of civil rights violations are not immediately aware of their injury. The experience of the federal courts with section 1983 litigation reveals that those who have been unlawfully denied their freedoms of belief, speech, and association – to use the majority's own examples – almost invariably are prepared to commence a civil rights action within a matter of months, if not weeks. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 378 (1978); *Wooley v. Maynard*, 430 U.S. 705, 708-09 (1977). Although there may be a few cases in which civil rights violations are not readily apparent to their victims, these cases usually raise the question of when the limitation period starts, not how long it runs. Because a section 1983 claim does not accrue until the plaintiff knows or has reason to know of the injury which is the basis for his action, *Barrett v. United States*, 689 F.2d 324, 333 (2d Cir.1982), *cert. denied*, 462 U.S. 1131 (1983), we need not select the statute of limitation merely to accommodate the rare case where the plaintiff's injury is not immediately obvious.

The majority's suggestion that section 1983 plaintiffs require more than a year to investigate and explore the basis for their claims is not a persuasive argument for rejecting the one-year statute. This Court has substantially relaxed both the amount of detail required in section 1983 complaints, *Washington v. James*, 782 F.2d 1134, 1138 (2d Cir.1986); *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir.1983), and the amount of evidence the plaintiff is required to collect before filing suit. *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir.1986). "A plaintiff does not have to be prepared to meet a summary judgment motion as soon as the complaint is filed." *Id.* Moreover, if, as is often the case, the section 1983 plaintiff's complaint contains a cause of action based on a state intentional tort with a one-year statute of limitation, plaintiff will want to commence suit within one year in any event.

Finally, my colleagues assert that section 1983 plaintiffs should be given more than one year to file suit in order to accommodate

a situation in which the legality of the act complained of may be unsettled or not yet decisively adjudicated. The identical argument was rejected by this Court in *Fiesel v. Board of Education of the City of New York*, 675 F.2d 522 (2d Cir.1982), where we held that a section 1983 plaintiff could not justify her delay in bringing suit by the fact that her right of recovery previously had been far from settled and actually had been barred by controlling Supreme Court authority. As this Court explained then:

> The only sure way to determine whether a suit can be maintained is to try it. The application of the statute of limitations cannot be made to depend upon the constantly changing state of the law, and a suitor cannot toll or suspend the running of the statute by relying upon the uncertainties of controlling law. It is incumbent upon him to test his right and remedy in the available forums.

Id. at 524-25 (quoting *Versluis v. Town of Haskell*, 154 F.2d 935, 943 (10th Cir.1946)).

Indeed, because there is a recognized public interest in allowing public officials to effectively discharge their discretionary authority in areas where the law has not been clearly charted, *Davis v. Scherer*, *supra*, 468 U.S. at 195-96, the "unsettled law" argument cuts two ways. In the context of qualified immunity, the Supreme Court has held that the absence of a clear previous adjudication of the legality of a public official's actions is a decisive reason for overriding the otherwise pressing federal interest in allowing the victim of a constitutional tort to recover damages from that official. *Id.* at 190, 194-96. It is therefore quite ironic that my colleagues urge the changes in section 1983 jurisprudence as a reason for selecting a longer limitation period.

CONCLUSION

When federal law provides no rule of decision for section 1983 actions, "§ 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby." *Robertson v. Wegmann*, *supra*, 436 U.S. at 593. As the Supreme Court recently has observed in a similar context, the role of the federal judiciary in fashioning rules of decision for section 1983 actions is "not to make a free-wheeling policy choice." *Malley v. Briggs*, 106 S.Ct. 1092, 1097 (1986).

I agree with the Courts of Appeals from other Circuits which hold that a limitation period governing all intentional torts is better analogized to section 1983 claims than a limitation period confined almost entirely to unintentional personal injuries. I also agree with the consensus of the other Courts of Appeals that a one-year limitation period for section 1983 is not so short as to be inherently inconsistent with the policies underlying the Civil Rights Act. For those reasons, I would reverse the district judge's holding that section 1983 claims in New York are governed by the three-year limitation period and would hold that such claims are governed by the one-year period set forth in CPLR § 215(3).

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 86-8027, 86-7343

TOM U.U. OKURE,

Plaintiff-Appellee,

v.

JAVAN OWENS and DANIEL G. LESSARD,

Defendants-Appellants.

NOTION OF MOTION FOR LEAVE TO APPEAL

MOTION BY: (Name and tel. no. of law firm and of attorney in charge of case)	OPPOSING COUNSEL: (Name and tel. no. of law firm and of attorney in charge of case)
ROBERT ABRAMS *Attorney General of the State of New York*	JOSEPH M. BRENNAN SULLIVAN, REHFUSS, CUNNINGHAM & BRENNAN

[Formal matter deleted.]

Judge or agency whose order is being appealed:

NEAL P. MCCURN, *United States District Judge, Northern District of New York*

Brief statement of the relief requested:

Leave to appeal from the Court's order denying defendants' motion to dismiss based on statute of limitations.

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

/s/ Ellsworth A. Van Graafeiland
/s/ Ralph K. Winter
/s/ Roger J. Miner

5/6/86
Date

Circuit Judges

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

TOM U.U. OKURE,	:	
Plaintiff,	:	ORDER
—against—	:	CIVIL ACTION FILE NO. 85-CV-1483
JAVAN OWENS and DANIEL G. LESSARD,	:	
Defendants.	:	(JUDGE McCURN)

APPEARANCES:	OF COUNSEL:
SULLIVAN, REHFUSS, CUNNINGHAM & BRENNAN *Attorneys for Plaintiff* 152 Central Avenue Albany, New York 12205	JOSEPH M. BRENNAN, ESQ. STEPHEN J. REHFUSS, ESQ.
ROBERT ABRAMS *Attorney General of the State of New York* Attorney for Defendants The Capitol Albany, New York 12224	EILEEN E. BRYANT C. MICHAEL REGER *Assistant Attorneys General*

HONORABLE NEAL P. MCCURN, District Judge

Defendants having moved under 28 USC § 1292(b) for an amendment of the order of the undersigned made on January

23, 1986 which denied defendants motion to dismiss, to include in this order a statement pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure and 28 USC § 1292(b), to the effect that said order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation; and furthermore for a stay of all proceedings in the district court pending the outcome of the application for and/or consideration of the interlocutory appeal in the Court of Appeals, and the motion having duly come on to be heard before the undersigned on April 1, 1986, and due deliberation having been had thereon, it is

ORDERED that the order of this Court entered on January 23, 1986 be and the same is hereby amended and supplemented to include the following statement: "This order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and an immediate appeal from this order may materially advance the ultimate termination of this litigation. This question is whether a one year period of limitations obtained from New York Civil Practice Law and Rules § 215.3 should be applied in bar of this action, or a three year period of limitations obtained from New York Civil Practice Law and Rules § 214.5 should be applied to allow this action in light of the decision rendered by the United States Supreme Court in *Wilson v Garcia*, ___ US ___, 105 S Ct 1938, (1985).", and it is further

ORDERED that the part of defendants' motion for a stay of proceedings in this Court under 28 USC § 1292 (b) be and the same is hereby denied.

DATED: Syracuse, New York
April 7, 1986

/s/ Neal P. McCurn

Honorable Neal P. McCurn
United States District Court Judge

MEMORANDUM DECISION AND ORDER, OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

No. 85-CV-1483

TOM U.U. OKURE,

Plaintiff.

v.

JAVAN OWENS and DANIEL G. LESSARD,

Defendants.

Appearances:

Sullivan, Rehfuss, Cunningham & Brennan, Albany, N.Y., for plaintiff; Joseph M. Brennan, of counsel.
Robert Abrams, Atty. Gen., Albany, N.Y., for defendants; Eileen E. Bryant, Asst. Atty. Gen., of counsel.

McCURN, District Judge.

MEMORANDUM-DECISION AND ORDER

Plaintiff brings the present action under 42 U.S.C. § 1983 seeking damages for the alleged violation of plaintiff's constitutional rights. Defendants move to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons discussed below the court denies defendants' motion.

BACKGROUND

On January 27, 1984, defendants arrested plaintiff for disorderly conduct on the premises of the State University of New York in Albany, New York. Defendants are members of the State University Police. Plaintiff filed the present complaint on November 13, 1985. The complaint alleges that defendants violated plaintiff's constitutional rights by arresting him without cause and beating him. Plaintiff seeks $50,000 in damages.

Defendants have moved to dismiss the complaint on the ground that it is time-barred. They contend that the statute of limitations in the present action is one year under the New York Civil Practive Law and Rules § 215(3).

DISCUSSION

Where Congress fails to provide a limitations period for a federal cause of action, the courts will generally apply the state statute of limitations for the most analogous state action, as long as the state law does not conflict with federal law or policy. *Wilson v. Garcia*, _____ U.S. _____, 105 S.Ct. 1938, 1942 (1985); *Burnett v. Grattan*, ____ U.S. ____, 104 S.Ct. 2924, 2929 (1984); *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84, (1980). No specific statute of limitations exists for 42 U.S.C. § 1983 claims. Accordingly, the courts have interpreted 42 U.S.C. § 1988 to require application of the most analogous state statute of limitations. *See eg. Wilson* , 105 S.Ct. at 1942-43; *Burnett*, 104 S.Ct. at 2929.

Prior to *Wilson* the rule was settled that New York's three-year statute of limitations for actions to recover upon a liability created by statute, N.Y.Civ.Pract.Law § 214(2) (McKinney 1972 & Supp. 1984-85), applied to § 1983 actions brought in New York. *Pauk v. Board of Trustees of City University of New York*, 654 F.2d 856 (2d Cir.1981), *cert. denied*, 455 U.S. 1000 (1982). However, the rule established in *Pauk* is no longer valid. In *Wilson* the Supreme Court affirmed the Tenth Circuit Court of Appeal's determination that New Mexicio's statute of limitations for actions under the State's Tort Claim Act should not

apply to § 1983 claims. The Supreme Court held that all § 1983 claims should be characterized for limitations purposes as personal injury actions. *Wilson*, 105 S.Ct. at 1949.

Under New York law the general statute of limitations for actions to recover for personal injury is three years. N.Y.Civ.Pract.Law § 214(5). However, New York has a separate, one-year statute for actions to "recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or violation of the right of privacy under section fifty-one of the (New York) civil rights law". N.Y.C.Civ.Pract.Law § 215(3). Defendants contend that § 215(3), governing the above intentional torts, is the most appropriate New York statute of limitations for § 1983 claims. In support of their positon defendants emphasize that the civil rights statutes grew out of the Klu Klux Klan's violent activities.

The court believes that defendants have misconstrued the Supreme Court's intent in *Wilson*. In selecting a general characterization for all § 1983 claims, the Supreme Court was concerned with "uniformity, certainty, and minimization of unnecessary litigation." The Court intended to ensure that the one most appropriate statute of limitations in each state would be applied to all § 1983 claims and that the borrowed limitations period would "not discriminate against the federal civil rights remedy." *Wilson*, 105 S.Ct. at 1947. In choosing a uniform characterization the Supreme Court recognized that "(a)lmost every § 1983 claim can be favorably analogized to more than one of the ancient common law forms of action, each of which may be governed by a different statue of limitations." *Id.* at 1945. The Court also noted, "When § 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace." *id.* at 1946. For example, the plaintiff's § 1983 claim in *Wilson*, as in the present action, could be characterized as a state tort claim for false arrest, assault and battery, or personal injury. It could also be viewed generally as a claim arising from a statute or from the state's specific statute governing state agents' torts. The Supreme Court further emphasized the broad scope of § 1983 claims by stating:

> A catalog of other constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard—to identify only a few. If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim.

Id. See also Id. at 1946 n. 31 (quoting Justice Blackmun's discussion of other causes of action that have been alleged under § 1983.)

Section 215(3) of the New York Civil Practice Law and Rules is a narrowly drawn statute which is applicable only to certain intentional torts. Although the present action may arise, at least in part, from an assault and battery, application of § 215(3) would characterize all § 1983 claims as intentional tort claims for assault, battery, false imprisonment, malicious prosecution, libel, or slander. In *Wilson* the Supreme Court rejected such a narrow approach. The Court, stated, "In this light, practical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose." *Id.* at 1945. Having noted that "the § 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringments of individual liberty" and that the Forty-Second Congress would probably have characterized § 1983 "as conferring a general remedy for injuries to personal rights," *Id.* at 1948, the Court stated:

> The characterization of all § 1983 actions involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983. *General personal*

> *injury actions*, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most likely that the period of limitations applicable to such claims ever was, or ever would be fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect. (emphasis added)

Id. at 1949. Accordingly, the Supreme Court chose to characterize § 1983 claims broadly in terms of general personal injury actions and not in terms of a specific type of intentional tort, as defendants advocate. Section 214(5) of the New York Civil Practice Law and Rules in New York's statute of limitations for general personal injury actions and is the most appropriate limitations period to apply to § 1983 claims.

Moreover, the court may not borrow a state limitations period for a federal cause of action which conflicts with federal policy. The central objective of the civil rights statutes is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. *Burnett*, 104 S.Ct. at 2932. The Supreme Court has stated:

> § 1983 provides "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972). The high purposes of this unique remedy make it appropriate to accord the statute "a sweep as broad as its language."

Wilson, 105 S.Ct. at 1945. To characterize all § 1983 claims as personal injury actions arising from assault, battery, false imprisonment, malicious prosecution, libel, or slander and to apply the one-year statute of limitations of New York Civil Practice Law and Rules § 215(3) would improperly restrict the scope of § 1983 and controvert federal policy.

This court's decision also follows the practice of the other courts in this circuit. Since the Supreme Court decided *Wilson*, the federal courts in the Second Circuit have been applying to civil rights claims New York's three-year statute of limitations for general personal injury actions. *See e.g. Testa v. Gallagher*, No. 85-CV-3918, slip op. (S.D.N.Y. Nov. 5, 1985); *Grinan v. Willowbrook Development Center*, No. 84-CV-2769, slip op. (S.D.N.Y. Oct. 17, 1985); *Ladson v. New York City Police Department*, 614 F.Supp. 878, 879 (S.D.N.Y.1985); *Rodrigues v. Village of Larchmont*, 608 F.Supp. 467, 476-77 (S.D.N.Y.1985); *Snell v. Suffolk County*, 611 F.Supp. 521, 524 (E.D.N.Y.1985); *Williams v. Allen*, 616 F.Supp. 653, 655 (E.D.N.Y.1985). Defendants are unable to cite one case in this circuit which has used a different limitations period.

Accordingly, the court holds that the correct limitations period to apply in civil rights actions is New York's three-year statute of limitations for general personal injury actions, N.Y.Civ.Pract.Law § 214(5). The present action accrued on January 27, 1984. Plaintiff filed his complaint on November 13, 1985, well within the three-year limitations period. Because the present complaint is timely, defendants' motion to dismiss is denied.

IT IS SO ORDERED.

DATED: January 23, 1986
Syracuse, New York

/s/ Neal P. McCurn

Neal P. McCurn
U.S. District Judge

OPPOSITION

BRIEF

No. 87-56

In The

Supreme Court of the United States

October Term, 1987

JAVAN OWENS and DANIEL G. LESSARD,
Petitioners,

vs.

TOM U.U. OKURE,
Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

JOSEPH M. BRENNAN
MICHAEL J. KEENAN
SULLIVAN, REHFUSS,
CUNNINGHAM & BRENNAN
Attorneys for Respondent
Office and P. O. Address
152 Central Avenue
Albany, New York 12206
Phone: (518) 434-3125

DONALD DE'ANGELIS*
DE'ANGELIS, KAPLOWITZ,
RICE & MURPHY
267 Delaware Avenue
Delmar, NY 12054
(518) 439-8191

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On November 13, 1985, the appellee, TOM U.U. OKURE, filed a complaint in the United States District Court, Northern District of New York, in which he alleged violations of his civil rights under Title 42 U.S.C. § 1983 by the appellants, Javan Owens and Daniel G. Lessard, members of the University Police, Department of Public Safety, State University of New York at Albany. The appellee, TOM U.U. OKURE, by his complaint, seeks damages for an incident which occurred on January 27, 1984.

On January 27, 1984, at approximately 3:55 p.m., the appellee, TOM U.U. OKURE, was lawfully on the premises known as the Business Administration Building at the State University of New York at Albany. At said time, the appellee, TOM U.U. OKURE, without any negligence on his part, was arrested by the appellants, Javan Owens and Daniel G. Lessard, members of the University Police, and was forcibly transported by them to a Police Detention Center. During the course of said arrest and detention, the appellants, Javan Owens and Daniel G. Lessard, acting as members of the University Police, carried out their duties as police officers of the University Police in arresting the appellee in such a manner as to cause the appellee, TOM U.U. OKURE, to sustain physical injury, shame, humiliation, and great emotional distress.

The appellee complains that during the course of said arrest and detention, the appellants, while acting as members of the University Police, carried out their duties in such a manner as to cause the appellee, TOM U.U. OKURE, to be deprived of his constitutional rights, in violation of Title 42, § 1983, of the United States Code.

Appellants moved to dismiss the complaint, asserting that a one-year statute of limitations, applicable under New York law to intentional personal injury claims, should be applied to all 42 U.S.C. § 1983 claims in the federal courts of New York. Said motion was denied and in a memorandum-decision and order, the Hon. Neal P. McCurn, stated that § 1983 actions are more nearly analogous to claims for general personal injury actions and that, therefore, New York's three-year general personal injury statute is applicable to all § 1983 claims.

The Circuit Court of Appeals for the Second Circuit affirmed the denial of appellants' motion to dismiss. The Court of Appeals followed this court's guidance in *Wilson v. Garcia,* 471 U.S. 261, in characterising § 1983 actions as general personal injury actions sounding in tort. The Court found that New York's general tort statute of limitations set forth in NYCPLR § 214(5) was applicable in § 1983 cases.

———o———

ARGUMENT

The most closely analogous statute of limitations for actions brought under 42 U.S.C. § 1983 is New York's three-year statute of limitations for personal injury claims set forth in CPLR 214(5).

(1)

In *Wilson v. Garcia,* 470 U.S. 261, 105 S.Ct. 1938 (1985), the Court held that in each state the federal court must select "the one most appropriate statute of limitations for all of § 1983 claims", (at 1947). The *Wilson*

court reviewed the application of various New Mexico statutes of limitations periods to § 1983 claims and held that the general personal injury statute was the "most analogous" to § 1983 claims. However, the New Mexico statute did not differentiate between causes of action for intentional and unintentional personal injury. As noted by Justice O'Connor in her dissent, at 1952-53 (O'Connor, J., dissenting), the difficulty with this approach was what to do in the case of states which, like New York, have two periods of limitations for personal injury, one for intentional torts (CPLR § 215 [3]) and the other for negligent torts (CPLR § 214 [5]).

In arguing that the New York statute of limitations for intentional torts should apply, the appellants rely heavily on the purported legislative purpose of § 1983 and on what they claim was the *Wilson* court's reliance on the same. The appellants cite the sadistic actions of the Ku Klux Klan and its effect on the Civil Rights Act of 1871 in claiming that the intentional torts statute should be applied. The appellants contend that the rationale of *Wilson* requires selection of New York's intentional torts statute. The appellee contends that the appellants have misconstrued the Supreme Court's intent in *Wilson.*

The Court was concerned with "uniformity, certainty, and minimization of unnecessary litigation" in selecting a general characterization for all § 1983 claims. The intent was to insure that the "one most appropriate" statute of limitations in each state be applied to all § 1983 claims and that the borrowed limitations period would "not discriminate against the federal civil rights remedy", (at 1947).

The *Wilson* court noted, "when § 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace", (at 1946). The *Wilson* court emphasized the broad, rather than narrow scope set forth by the appellants, of § 1983 claims. Application of CPLR § 215 (3) would characterize all § 1983 claims as intentional tort claims for assault, battery, false imprisonment, malicious prosecution, liable, or slander. The *Wilson* court rejected such a narrow approach. The court stated, "in this light, practical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose", (at 1945). In this case, as in many § 1983 claims, it was not possible at the time the complaint was filed for the plaintiff to characterize the defendants' acts as intentional or negligent. It may be that this cannot be determined, except by the finder of fact after all the evidence is considered.

In noting that "the § 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty" and that the 42nd Congress would probably have characterized § 1983 "as conferring a general remedy for injuries to personal rights", (*Id.* at 1948), the court stated:

> "The characterization of all § 1983 actions involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983. *General personal injury actions*, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most likely that the period of limitations applicable to such

> claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect", (emphasis added). *Id.* at 1949.

By this decision, the Supreme Court chose to characterize § 1983 claims broadly in terms of general personal injury actions and not in terms of a specific type of intentional tort as the appellants contend. New York's three-year statute of limitations for general personal injury actions, CPLR § 214 (5), is the most appropriate limitations period to apply to § 1983 claims.

The *Wilson* court agreed with the 10th Circuit that:

> "The tort action for the recovery of damages is the best alternative available. We agree that this choice is supported by the nature of the § 1983 remedy and because it insures the federal interest that borrowed a period of limitations not discriminated against the federal civil rights remedy." *Id.* 85 L.Ed. 2d at 266.

The court found that this choice was consistent with the legislative history of § 1983:

> "At the 42nd Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as a *general remedy for injuries to personal rights.*" *Id.* 85 L.Ed. 2d, at 268 (emphasis added).

Finally, as noted above, the court held that by applying a general tort provision to § 1983, it was unlikely that a state would have mandated to discriminate against federal claims.

> "General personal injury actions, sounding in tort, constitute a major part of the total volume of

civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims never was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." *Id.* 85 L.Ed. 2d, at 269.

Therefore, the *Wilson* court requires that a "general" tort provision apply to § 1983 claims and not a specialized one.

(2)

Since the Supreme Court decided *Wilson*, the federal courts in the Second Circuit have been applying New York's three-year statute of limitations for general personal injury actions to civil rights claims falling under § 1983. *See e.g. Okure v. Owens*, 625 F. Supp. 1568 (N.D. N.Y. 1986); *Testa v. Gallagher*, No. 85-CV-3918, Slip Op. (S.D.N.Y. Nov. 5, 1985); *Grinan v. Willowbrook Developmental Center*, No. 84-CV-2769, Slip Op. (S.D.N.Y. Oct. 17, 1985); *Ladson v. New York City Police Dept.*, 614 F. Supp. 878, 879 (S.D.N.Y. 1985); *Rodrigues v. Village of Larchmont*, 608 F. Supp. 467, 476-77 (S.D.N.Y. 1985); *Snell v. Suffolk County*, 611 F. Supp. 521, 524 (E.D.N.Y. 1985); *Williams v. Allen*, 616 F. Supp. 653, 655 (E.D.N.Y. 1985).

The appellants' reliance on the circuit court opinions in *Mulligan v. Hazard*, 777 F. 2d 340 (6th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3808 (June 9, 1986); *Gates v. Spinks*, 771 F. 2d 916 (5th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3595 (1986); and *Jones v. Preuit & Mauldin*, 763 F. 2d 1250, *cert. denied*, 106 S.Ct. 893 (1986), is clearly undercut by the Supreme Court denial of certiorari to several

companion cases to *Wilson* decided by the 10th Circuit. *Mishmash v. Murray City*, 730 F. 2d 1366, 1367, (10th Cir. 1984), *cert. denied* U.S. , 85 L.Ed. 2d 476 (1985) (10th Circuit shows a residual statute of Utah covering tort injuries and rejects a specialized provision for "liable, slander, assault, battery, false imprisonment or seduction."); *Hamilton v. City of Overland Park, Kansas*, 730 F. 2d 613, 614, (10th Cir. 1984), *cert. denied*, U.S. , 85 L.Ed. 2d 476 (1985) (10th Circuit adopts a Kansas general provision for tort actions and rejects a provision for "assault, battery, malicious prosecution, or false imprisonment."). The denial of certiorari in these companion cases, after the *Wilson* decision, presents a strong argument that the 10th Circuit's holdings in these cases were correct as well. *Jones v. Preuit & Mauldin, Id.* (White, J., dissenting from denial of certiorari) ("Had we considered those decisions [the other 10th Circuit opinions] inconsistent with *Wilson*, our normal course would have been to grant certiorari in order to vacate the decisions below and remand for reconsideration in light of *Wilson*".)

CONCLUSION

Pursuant to this Court's decision in *Wilson*, New York's three-year statute of limitations for general personal injury actions is the most appropriate statute of limitations for claims arising under § 1983. This Court has made its position clear in *Wilson v. Garcia* and no

new issues are raised in this case that would warrant the granting of appellants' motion.

Dated: Albany, New York
September 28, 1987

Respectfully submitted,

JOSEPH M. BRENNAN
MICHAEL J. KEENAN
SULLIVAN, REHFUSS,
CUNNINGHAM & BRENNAN
Attorneys for Respondent
Office and P. O. Address
152 Central Avenue
Albany, New York 12206
Phone: (518) 434-3125

DONALD DE'ANGELIS*
DE'ANGELIS, KAPLOWITZ,
RICE & MURPHY
267 Delaware Avenue
Delmar, NY 12054
(518) 439-8191

*Counsel of Record

JOINT APPENDIX

No. 87-56

IN THE

Supreme Court of the United States

October Term, 1987

JAVAN OWENS and DANIEL G. LESSARD,
Petitioners,

against

TOM U. U. OKURE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

JOINT APPENDIX

ROBERT ABRAMS
O. PETER SHERWOOD*
PETER H. SCHIFF
CHARLES R. FRASER
120 Broadway
New York, New York 10271
(212) 341-2020

Counsel for Petitioners

KENNETH KIMERLING*
Puerto Rican Legal Defense
& Education Fund, Inc.
99 Hudson Street—14th Floor
New York, New York 10013
(212) 219-3360

JOHN A. POWELL
STEVEN SHAPIRO
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JOSEPH M. BRENNAN
Sullivan, Rehfuss,
Cunningham & Brennan
152 Central Avenue
Albany, New York 12206
(518) 434-3125

Counsel for Respondents

* Counsel of Record

Petition for Certiorari Filed July 6, 1987
Certiorari Granted March 21, 1988

8 pp

TABLE OF CONTENTS*

* The orders and opinions in the courts below were reproduced in the appendix to the petition for certiorari, pp. A-1—A-26.

Relevant Docket Entries in United States Court of Appeals for the Second Circuit

Date	Filings—Proceedings 86-7343
4-18-86	Movant OWENS AND LESSARD Notice of Motion for Leave to Appeal pursuant to 28 U.S.C. § 1292(b) filed ***
4-24-86	Plaintiff TOM U. U. OKURE, Answer to Petition for Permission to Appeal filed ***
5- 6-86	Order granting the Appellants' OWENS AND LESSARD Motion for Leave to Appeal, filed ***
	* * *
7-11-86	Record on Appeal filed (original papers of the district court)
	Appellant OWENS brief filed ***
	Appellant OWENS joint appendix filed ***
	Amicus curiae CITY OF NEW YORK amicus brief filed ***
7-14-86	Amicus curiae PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND, et al. brief filed ***
	Appellee OKURE brief filed ***
	* * *
8- 4-86	Appellant OWENS reply brief filed ***
	* * *
8-22-86	Respondent OKURE letter pursuant to F.R.A.P. Rule 28(j) *received*
9-25-86	Case heard before VanGraafeiland, Meskill, Newman, C.J.J.

Relevant Docket Entries in United States Court of Appeals for the Second Circuit

Date	Filings—Proceedings 867343
3- 5-87	Amici curiae PUERTO RICAN LEGAL DEFENSE & EDUCATIONAL FUND, Inc. letter pursuant to Rule 28(j) of F.R.A.P. *received*
4- 6-87	Judgment affirmed by published signed opinion (TJM)
	Judge VanGraafeiland dissents in a separate opinion (EVG)
	Judgment filed
	* * *
5- 7-87	Appellee OKURE statement of costs filed ($82.98)
5-11-87	Mandate (opinion, judgment, statement of costs) issued
7- 6-87	Notice of filing a petition for Writ of Certiorari in the Supreme Court filed (S.C. #87-56)

Relevant Docket Entries in United States District Court for the Northern District of New York

Date	Proceedings 85-CV-1483
1985	
Nov. 13	Filed complaint, issued summons and returned to attorney for service
Nov. 21	Filed original summons with return of service of summons and complaint upon Defendant Javan Owens through Officer Sheppard 11/18/85, Daniel Lessard through Officer Sheppard 11/18/85
Dec. 4	Filed Notice of Motion to Dismiss the complaint, returnable on 1/7/86 at Albany, New York
Dec. 27	Filed Defendants' *** Memorandum of Law in support of Defendants' Motion to Dismiss the complaint
1986	
Jan. 7	Filed Affidavit in Opposition to Motion to Dismiss
	Filed Plaintiff's Memorandum of Law in Opposition to the Defendants' Motion to Dismiss the complaint
	Motion by Defendants to dismiss the complaint —Reserved
Jan. 23	Filed Memorandum-Decision and Order of Judge McCurn dated 1/23/86 denying Defendants' Motion to Dismiss the complaint
	* * *
Mar. 11	Filed Notice of Motion to Amend Order to include 28 U.S.C. 1292(b) Statement, by Defendant New York State, returnable on 4/1/86, at Albany, New York with Order
	Filed Memorandum of Law in support ***

Relevant Docket Entries in United States District Court for the Northern District of New York

Date	Proceedings 85-CV-1483
Mar. 18	Filed Affidavit in Opposition to Motion by Joseph Brennan
	Filed Plaintiff's Memorandum of Law in Opposition to Defendants' Motion
Apr. 1	Motion Cal.—Motion by Defendants to amend Order to include 28 U.S.C. 1292(b) Statement—denied as to stay and reserved on remainder; Attorney Regger to submit proposed orders. Appearances: Steven Rehfuss for Plaintiff; Michael Regger for Defendants
Apr. 8	Filed Order of Judge McCurn dated 4/7/86, denying part of the Defendants' motion for a Stay of Proceeding in this Court and amending the Court's order entered on 1/23/86
May 6	Filed Defendants' Notice of appeal from the order filed and entered in this action on 1/23/86 denying Defendants' Motion to Dismiss
May 9	Filed certified copy of Order of C.C.A. granting leave to appeal from Court's order denying Defendants' Motion to Dismiss, dated 4/18/86

* * *

Complaint

[caption omitted]

The plaintiff, TOM U. U. OKURE, through his attorneys, SULLIVAN, REHFUSS, CUNNINGHAM & BRENNAN, complaining of the defendants, JAVAN OWENS and DANIEL G. LESSARD, alleges:

1. The plaintiff is a resident of the City of Albany, County of Albany, State of New York.

2. That the defendant, Javan Owens, is a member of the University Police, Department of Public Safety, State University of New York at Albany.

3. That the defendant, Daniel G. Lessard, is a member of the University Police, Department of Public Safety, State University of New York at Albany.

4. That this action is brought pursuant to a violation of Title 42, Section 1983, of the United States Code.

5. That on the 27th day of January, 1984, at approximately 3:55 P.M., the plaintiff, TOM U. U. OKURE, was lawfully on the premises known as the Business Administration Building at the State University of New York at Albany, 1400 Washington Avenue, Albany, New York.

6. That at the time and place above-mentioned, the plaintiff, TOM U. U. OKURE, without any negligence on his part, was arrested without cause by the defendants, Javan Owens and Daniel G. Lessard, members of the University Police, Department of Public Safety, State University at New York, and was forcibly transported by them to a Police Detention Center.

7. That the defendants, Javan Owens and Daniel G. Lessard, at the time of said arrest were acting as members of the University Police, Department of Public Safety, State University of New York, and charged the plaintiff,

TOM U. U. OKURE, with disorderly conduct in violation of Section 240.20(2) of the Penal Law of the State of New York.

8. That in the process of said arrest and detention, the plaintiff, TOM U. U. OKURE, was battered and beaten by the defendants, Javan Owens and Daniel G. Lessard, and forced to endure great emotional distress, physical harm, and embarrassment.

9. That as a result of such negligence, the plaintiff, TOM U. U. OKURE, sustained personal injuries, including broken teeth and a sprained finger, mental anguish, shame, humiliation, legal expenses and the deprivation of his constitutional rights in violation of Title 42, Section 1983, of the United States Code.

WHEREFORE, the plaintiff demands judgment against the defendants in the amount of FIFTY THOUSAND DOLLARS ($50,000.00), together with costs and disbursements of this action.

JURY DEMAND

PLEASE TAKE FURTHER NOTICE that the plaintiff hereby demands that this proceeding be tried by a jury of six (6) persons.

SULLIVAN, REHFUSS, CUNNINGHAM & BRENNAN

By:

/s/

Joseph M. Brennan
Office & P.O. Address
311 State Street
Albany, New York 12210
Phone: (518) 434-3125

PETITIONER'S

BRIEF

No. 87-56

IN THE

Supreme Court of the United States

October Term, 1987

JAVAN OWENS and DANIEL G. LESSARD,

Petitioners,

against

TOM U.U. OKURE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway
New York, New York 10271
(212) 341-2020

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

CHARLES R. FRASER
Assistant Attorney General

Of Counsel

Question Presented For Review

Whether this Court's analysis in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), requires that the statute of limitations for intentional personal injury actions be borrowed for a civil rights suit under 42 U.S.C. § 1983, where state law provides different statutes of limitations for intentional and unintentional personal injury actions?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution, Statutes and Rules:

Other Authorities:

No. 87-56

IN THE

Supreme Court of the United States

October Term, 1987

JAVAN OWENS and DANIEL G. LESSARD,

Petitioners,

against

TOM U.U. OKURE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the lower courts are reported as *Okure v. Owens*, 625 F. Supp. 1568 (N.D.N.Y. 1986), *aff'd*, 816 F.2d 45 (2d Cir. 1987). These opinions are reproduced in the appendix to the petition for certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on April 6, 1987, and the petition for certiorari was filed pursuant to 28 U.S.C. §§ 1254(1), 2101(c), on July 6, 1987. The petition was granted on March 21, 1988. (108 S. Ct. 1218).

Statutes Involved

42 U.S.C. § 1983 states in part:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1988 states in part:

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title CIVIL RIGHTS, and of Title CRIMES, of the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

New York Civil Practice Law and Rules § 214 states in part:

> *Actions to be commenced within three years: for non-payment of money collected on execution; for penalty created by statute; to recover chattel; for injury to property; for personal injury; for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud*
>
> The following actions must be commenced within three years:
>
> • • •
>
> 5. an action to recover damages for a personal injury except as provided in sections 214-b and 215;
>
> 6. an action to recover damages for malpractice, other than medical, dental or podiatric malpractice. . . .

New York Civil Practice Law and Rules § 214-a states in part:

> *Action for medical, dental or podiatric malpractice to be commenced within two years and six months; exceptions*
>
> An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.
>
> • • •

New York Civil Practice Law and Rules § 215 states in part:

> *Actions to be commenced within one year: against sheriff, coroner or constable; for escape of prisoner; for assault, battery, false imprisonment, malicious prosecution, libel or slander; for violation of right of privacy; for penalty given to informer; on arbitration award*
>
> The following actions shall be commenced within one year:
>
> • • •
>
> 3. an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law. . . .

Statement of the Case

Respondent alleges that he was injured during his arrest on January 24, 1984 by petitioners, who are campus security officers for the State University of New York in Albany, New York (JA5-JA6).[1] Respondent filed this suit for damages pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, on November 13, 1985, twenty-two months after the events at issue (JA3).

Petitioners moved to dismiss the suit as time-barred, relying on New York's one-year statute of limitations for intentional personal injury torts. New York Civil Practice Law and Rules ("N.Y.C.P.L.R.") § 215(3). Respondent

1. References to "JA" are to pages in the joint appendix. The orders and opinions in the courts below were reproduced in the appendix to the petition for certiorari, cited herein as "Pet. App."

relied on New York's three-year limitation for unintentional personal injury claims. The District Judge denied petitioners' motion (Pet. App. A-21—A-26), but certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a) (Pet. App. A-19—A-20). The Court of Appeals accepted the interlocutory appeal (Pet. App. A-18).

A divided panel of the Court of Appeals affirmed the denial of the motion to dismiss (Pet. App. A-1—A-17). The majority characterized § 1983 violations as "typically, and perhaps necessarily, intentional" wrongs, but held that "that characterization is not controlling" (Pet. App. A-5). Instead, the majority construed this Court's decision in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), to require selection of a state's most "general" personal injury statute of limitations (Pet. App. A-5). Turning to New York's statutes of limitations, the majority did not dispute that New York courts have construed New York's one-year limitation to apply generally to intentional personal injury tort claims, and New York's three-year period to apply generally to unintentional personal injury claims. However, the majority rejected New York's judicial construction of its own statutes of limitations in favor of "the plain structure of the New York statutes," which makes the intentional personal injury provision an "exception" to the "general" unintentional tort provision (Pet. App. A-5—A-6).

The majority buttressed its reasoning by reference to the fact that New York's intentional tort limitations period is shorter than its unintentional tort limitations period. The majority concluded that because the longer period would better accommodate a prospective plaintiff's need

"to reflect and to probe" before bringing litigation, the longer period would better serve the federal remedial interests "embedded in section 1983" (Pet. App. A-6—A-7).

The dissenting judge rejected the majority's exclusive reliance on the word "general" in this Court's opinion in *Wilson* v. *Garcia* (Pet. App. A-12). Instead, the dissent invoked this Court's repeated command that § 1983 claims be subject to the forum state's limitations applicable to state law claims that are most nearly analogous to § 1983 claims (Pet. App. A-13). The dissent observed that "the vast majority" of § 1983 violations are intentional wrongs and that "section 1983 originally was directed at acts of deliberate wrongdoing" (Pet. App. A-10—A-12). The dissent reviewed judicial and scholarly constructions of New York's statutes of limitations and concluded that N.Y.C.P.L.R. § 215(3) applies to "almost every intentional injury to the person" (Pet. App. A-8—A-10). Therefore, the dissent would have held that N.Y.C.P.L.R. § 215(3) "most nearly meets [the] requirements" of limitations borrowing for § 1983 cases in New York (Pet. App. A-13).

The dissent also rejected the majority's preference for a longer limitations period than the one-year provided by N.Y.C.P.L.R. § 215(3) The dissent argued that the judicial function is limited to selection of the statute of limitations applicable to the most nearly analogous state law claims and scrutiny of that statute for inconsistency with the policies underlying § 1983 (Pet. App. A-13—A-14). The dissent concluded, after surveying considerable authority, that the one-year limitation of N.Y.C.P.L.R. § 215(3) "is not so short as to be inherently inconsistent with the policies underlying the Civil Rights Act" (Pet. App. A-13—A-17).

In light of the division among the Circuits in choosing between intentional and unintentional tort statutes of limitations in § 1983 claims, petitioners sought a writ of certiorari from this Court, which was granted on March 21, 1988 (108 S. Ct. 1218).

Summary of Argument

Under *Wilson* v. *Garcia*, 471 U.S. 261 (1985), a single statute of limitations is to be borrowed for all 42 U.S.C. § 1983 claims within a State. Petitioners urge that New York's statute of limitations for intentional personal injury claims is applicable to § 1983 claims in New York.

I. A. The characterization of 42 U.S.C. § 1983 for purposes of drawing analogies to state law claims is a matter of federal law. Specifically, such characterization is to be made by reference to what Congress would have done in 1871 "[h]ad the 42nd Congress expressly focused on the issue." *Wilson* v. *Garcia*, 471 U.S. at 278. In *Wilson* v. *Garcia*, this Court discerned a Congressional concern with "atrocities that mainly sounded in tort." 471 U.S. at 277. A review of the legislative history shows that "there simply is no room for disagreement that section 1983 originally was directed at acts of deliberate wrongdoing. . ." (Pet. App. A-11, Van Graafeiland, J., dissenting).

B. Characterization of New York's statutes of limitations is a matter for New York law, and federal courts are not free to construe those statutes without regard to the constructions given them by New York's courts and commentators. New York's limitations structure provides a clear separation between intentional personal injury torts,

governed by N.Y.C.P.L.R. § 215(3), and unintentional personal injury torts, which are governed largely by N.Y. C.P.L.R. §§ 214 and 214-a. Because 41 U.S.C. § 1983 was directed primarily at intentional wrongs causing personal injury, and N.Y.C.P.L.R. § 215(3) is generally applicable to tort claims for intentional personal injury, § 215(3) must be applied to § 1983 claims unless it is inconsistent with federal law or policy.

II. Statutes of limitations serve to balance competing interests such as, on the one hand, repose, protection of defendants from stale claims, and protection of the judicial process from inaccurate fact-finding due to deterioration of evidence, and, on the other hand, the remedial, deterrent or other purposes of the underlying cause of action. Pursuant to 42 U.S.C. § 1988, the determination of the appropriate balance for claims under § 1983 is for state legislatures and courts, not federal courts. Federal interests are vindicated if (i) the state limitations period borrowed is that period applicable to state law claims which are most nearly analogous to § 1983 claims, and (ii) the borrowed state statute of limitations is not fundamentally and inherently inconsistent with the compensatory and deterrent policies of § 1983. *See Burnett* v. *Grattan*, 468 U.S. 42, 48 (1984). Because the one-year limitations period provided by N.Y.C.P.L.R. § 215(3) is neither so short as to render the § 1983 remedy ineffective nor in any other way "inconsistent with federal law in any respect," it must be applied to § 1983 claims in New York. *Wilson* v. *Garcia*, 471 U.S. at 279.

ARGUMENT

I

The Appropriate New York Statute Of Limitations For Personal Injuries To Be Applied To Claims Under 42 U.S.C. § 1983 Is The One-Year Provision For Intentional Torts.

A. *Under the principles announced in Wilson v. Garcia, in a state having several statutes of limitations applying to personal injury claims, the most appropriate one for the borrowing purposes of 42 U.S.C. § 1988 is that relating generally to intentional torts.*

In *Wilson* v. *Garcia*, 471 U.S. 261 (1985), this Court held that in each state a single statute of limitations should be borrowed from a state's law for 42 U.S.C. § 1983 claims and that the period favored should be the one governing "tort actions for the recovery of damages for personal injuries". 471 U.S. at 276. Since New Mexico had only one statute of limitations provision for all claims for personal injuries, the Court had no occasion to decide the issue presented here, where a state, such as New York, has different limitations periods for intentional and unintentional personal injury torts. It is petitioners' position, contrary to the conclusion of the majority below, but consistent with that of three other circuits,[2] that the reasoning of *Wilson* v. *Garcia*, as

2. *See, e.g., Mulligan* v. *Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986); *Gates* v. *Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert.denied*, 475 U.S. 1065 (1986); *Jones* v. *Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986). *But see Smith* v. *Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986); *Banks* v. *Chesapeake and Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986) (dictum).

well as this Court's earlier cases dealing with how to choose the most appropriate limitations provision for § 1983 cases, necessarily and logically leads to a choice of the statute of limitations for intentional personal injury claims.

As reiterated by the Court in *Wilson* v. *Garcia,* the first step in selecting the most analogous New York statute of limitations to apply to § 1983 claims is to "characteriz[e]" § 1983 claims. 471 U.S. at 268. Such characterization is governed by federal law and is to be made "in the same way" for "all § 1983 claims," rather than on a claim-by-claim basis. 471 U.S. at 271, 275. The characterization will therefore be made based on a "typical" § 1983 claim.

How best to characterize § 1983 for limitations purposes is a "question[] of statutory construction." 471 U.S. at 268. Such characterzation is to be made based on the intent of the Forty-Second Congress in enacting § 1983, not on "the wide diversity of claims that the new remedy would ultimately embrace." 471 U.S. at 275; *see id.* at 276-79; Note, Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims, 61 Notre Dame L. Rev. 440, 445 (1986). Based on such legislative intent, this Court held that "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort," specifically "tort claims for personal injury." 471 U.S. at 277. The Court found that the Forty-Second Congress did not consider that it was creating claims analogous to property claims or contract claims, that Congress would not likely have intended to apply "catchall periods of limitations for statutory claims that were later enacted by many States," and that Congress "would not have characterized § 1983 as providing a cause of action analogous to state remedies for wrongs committed by public officials." 471 U.S. at 277-79.

In *Wilson* v. *Garcia* the Court had no need to characterize § 1983 any more precisely than to conclude that § 1983 claims are best characterized as personal injury actions. 471 U.S. at 279; *see Goodman* v. *Lukens Steel Co.,* 107 S. Ct. 2617, 2621 (1987) (analogizing 42 U.S.C. § 1981 to Pennsylvania's statute of limitations applicable to personal injury tort claims). Its reasoning, however, leads to the conclusion that where a limitations dichotomy exists between intentional and unintentional torts, § 1983 claims should be characterized as most analogous to actions for intentional personal injury actions.

The legislation containing the provision currently codified as 42 U.S.C. § 1983 was known as the Ku Klux Klan Act. *E.g., Monroe* v. *Pape,* 365 U.S. 167, 171 (1961). During the debate on the Act, "supporters of the bill repeatedly described the reign of terror imposed by the Klan. . . . Hours of oratory were devoted to the details of Klan outrages—arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation—often committed in disguise and under cover of night." *Briscoe* v. *LaHue,* 460 U.S. 325, 337 (1983). The original draft of the Act's provision that became 42 U.S.C. § 1985 proposed to outlaw conspiracies to commit "murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny. . . ." *Monroe* v. *Pape,* 365 U.S. at 180. The final legislation, although different in language, *see id.* at 181, "was intended to apply to the abuses that had been described repeatedly in congressional debate." *Briscoe* v. *LaHue,* 460 U.S. at 339. The minutes of the first session of the Forty-Second Congress are filled with page after page of descriptions of

"these harrowing wrongs," Cong. Globe, 42d Cong., 1st Sess. (1871) at 444 (remarks of Rep. Butler), and a sampling of those descriptions is cited in the margin.[3] It suffices, however, to repeat this Court's own recent summary of the congressional debate, quoting one legislator's particularly eloquent speech:

3. Cong. Globe at 152-54 (remarks of Senator Sherman, introducing resolution directing Committee on Judiciary to report bill to redress "terror and crime" of Ku Klux Klan, described as "organized bands of desperate and lawless men"); *id.* at 155-57 (summary and quotations by Senator Sherman describing "cases of murder and whipping," some of which are "so horrible that I dare not and cannot read it", others of "plain, deliberate murder" that went unpunished); *id.* at 201 (remarks of Senator Nye); *id.* at 320-22 (summary by Representative Stoughton of testimony describing Klan "murders, whippings, intimidation, and violence against its opponents," with "thousands of murders and outrages . . . committed in the southern states and not a single offender brought to justice"); *id.* at 332 (remarks of Representative Hoar); *id.* at 340 (remarks of Representative Kelley, describing Klan as "scourage of the people" seeking to "accomplish by murder, conspiracy, and terror what they failed to do by open war—take possesion of this Government"; *id.* at 369-71 (remarks of Representative Monroe); *id.* at 389 (remarks of Representative Hoar); *id.* at 390-92 (remarks of Representative Elliot, stating that the bill "strikes at the homicidal proclivities which have become chronic . . . and the causes of the intimidation, outrages, and murders perpetrated"); *id.* at 412-13 (remarks of Representative Roberts); *id.* at 428 (remarks of Representative Beatty, concluding that "men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment"); *id.* at 436-40 (remarks of Representative Cobb, describing and cataloging some of the "numberless atrocities and crimes . . . the scourging of women and men, the hanging and assassination of citizens, and other untold outrages"); *id.* at 443-44 (review by Representative Butler of "the dreadful catalogue of outrages and murders"); *id.* at 457-61 (remarks of Representative Coburn); *id.* at 503 (remarks of Senator Pratt); *id.* at 516-18 (remarks of Representative Shellabarger); *id.* at 606 (enumeration by Senator Pool of "scourging, murder, and other outrages"); *id.* at 654 (remarks of Senator Osborn: "outrages of the worst order, the most inhuman violence and cold-blooded murders are committed with impunity"); *id.* at 691 (remarks of Senator Edmunds); *id.* at App. 166-67 (catalogue by Representative Williams of "this fearful array of crime and villainy").

The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. See *Briscoe* v. *LaHue*, 460 U.S. 325, 336-340 (1983). The debates on the act chronicle the alarming insecurity of life, liberty, and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents:

> "While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime and the records of public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong., 1st Sess., 374 (1871) (remarks of Rep. Lowe).

Wilson v. *Garcia*, 471 U.S. at 276 (footnote omitted).

In short, as Judge Van Graafeiland stated in dissent below, "there simply is no room for disagreement that section 1983 originally was directed at acts of deliberate wrongdoing" (Pet. App. A-11). The criminal "atrocities" that concerned Congress were acts of wantonness and intent, not of neglect or disregard. *Wilson* v. *Garcia*, 471 U.S. at 277.

In this respect, "it must be remembered that Congress acts against the background of the total *corpus juris* of the states". *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (quotation omitted). Congress in 1871 was well familiar with the distinction between intentional

and unintentional torts in New York's limitation law, as well as in that of most states at that time. New York's abolition of the common law "forms of action" by the enactment of a single code of civil procedure "was widely followed in the States." Rosenberg, Weinstein, Smit & Korn, *Elements of Civil Procedure* at 83 (3d ed. 1976). In particular, a number of states "patterned their limitations after the model established in the New York Code," Note, Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1192 (1950), although those states varied the specific times allowed for the types of claims. Many states retained the formal names of the common law writs in their statutes of limitations, referring to "trespass" to include the various types of "violence . . . to the body," from which current intentional personal injury torts descend, and referring to "trespass on the case" to include claims from which "the modern law of negligence" descends. Maitland, *The Forms of Action at Common Law* at 61-71 (1962). Other states, such as New York, recited the intentional torts. *E.g.*, N.Y. Code of Procedure § 73 (1848) ("libel, slander, assault, battery, or false imprisonment"). In either case, it appears that by 1871 almost every state had followed New York in distinguishing for limitations purposes between intentional and unintentional personal injury torts.[4] Especially in light of the criminal

4. Compilations of the states' statutes of limitations appear in appendices to Angell, *A Treatise on the Limitations of Actions at Law* (6th ed. 1876) and *id.* (5th ed. 1869). Comparison to the individual civil codes of the various states shows some inaccuracies in Angell's compilations, apparently due to his overlooking some code revisions. However, those inaccuracies are most often matters of detail, not of concept, and Angell's compilations are therefore a convenient means to survey state limitations law in the mid-nineteenth century. In particular, the division of personal injuries into intentional and unintentional torts, for limitation purposes, is obvious regardless whether one resorts to Angell's compilations or to the state statutes themselves.

atrocities that spurred the Forty-Second Congress to adopt § 1983, borrowing the limitations period for intentional torts for § 1983 purposes is appropriate and fully compatible with *Wilson* v. *Garcia*.

Although this Court has held that characterization of § 1983 is a matter of statutory construction, the characterization of § 1983 for limitations purposes would not be significantly altered if such characterization were made by reference to the unforeseen "diversity of claims" that § 1983 has come to embrace. *Wilson* v. *Garcia*, 471 U.S. at 275. As the majority below conceded, § 1983 violations "are typically, and perhaps necessarily, intentional" (Pet. App. A-5; *see* Pet. App. A-6). For instance, Eighth Amendment claims must be based upon "wanton" and "deliberate indifference to . . . serious illness or injury." *Estelle* v. *Gamble*, 429 U.S. 97, 105 (1976); see *Whitley* v. *Albers*, 475 U.S. 312 (1986) (Eighth Amendment prohibits physical force imposed "maliciously and sadistically for the very purpose of causing harm"). Similarly, due process claims require proof of more than mere negligence. *Daniels* v. *Williams*, 474 U.S. 327 (1986); *Davidson* v. *Cannon*, 474 U.S. 344 (1986), and equal protection claims require discriminatory intent or purpose. *E.g.*, *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). It also appears that Fourth Amendment suits alleging merely negligent misconduct fail to state claims. *Dodd* v. *City of Norwich*, 827 F.2d 1, 7 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988) (dictum). Judge Van Graafeiland observed that "[o]f all the nearly three dozen landmark cases cited in *Wilson* v. *Garcia*, 471 U.S. at 273-74 [nn. 26-30], and in Justice Blackmun's law review article, 60 N.Y.U.L. Rev. 1 (1985), cited in *Wilson* at 274

n.31, not one successfully challenged the legality of an unintentional or negligent act" (Pet. App. A-11).

For all these reasons, this Court's analogy between § 1983 and "tort claims for personal injury," *Wilson* v. *Garcia*, 471 U.S. at 277, should be refined to characterize § 1983 as most analogous to tort claims for *intentional* personal injury.

B. *New York's one-year statute of limitations in N.Y.C.P.L.R. § 215(3) is the proper period to be adopted under § 1988.*

As Judge Van Graafeiland observed below, "[i]n order to select the most analogous New York statute, it is necessary, of course, to understand the nature of the New York limitations scheme" (Pet. App. A-8). Just as characterization of § 1983, a federal statute, is governed by federal law, construction of New York's statutes of limitations is governed by New York law. *Singleton* v. *City of New York*, 632 F.2d 185, 190 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 ,1981) ("we must . . . look to the state court interpretations of the statutes to see where the claim fits into the state scheme"; quotation omitted).

New York law distinguishes for limitations purposes between intentional and unintentional personal injury torts. A three-year limitation applies to "personal injury except as provided in sections 214-b and 215." N.Y.C.P.L.R. 214(5). (Section 214-b applies a two-year limitation to Vietnam veterans' Agent Orange exposure claims.) In addition, actions for medical, dental and podiatric malpractice are subject to a two-year-and-six-month limitations period under N.Y.C.P.L.R. § 214-a, while other malpractice

claims are subject to a three-year period separately specified in N.Y.C.P.L.R. § 214(6). Section 215(3) provides a one-year limitation for claims for "assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy."

This enumeration in § 215(3) appears to include all of the intentional personal injury torts recognized during the mid-nineteenth century. See Hilliard, *The Law of Torts* (4th ed. 1874) (discussing assault, battery, false imprisonment, libel, slander and malicious prosecution); Cooley, *A Treatise on the Law of Torts* (1st ed. 1879) (same). The one-year limitation also applies to newly coined intentional personal injury torts not within the enumeration in § 215(3), such as intentional infliction of emotional distress, *Hansen* v. *Petrone*, 124 A.D.2d 782, 508 N.Y.S.2d 500 (2d Dept. 1986); *Parker* v. *Port Authority of New York and New Jersey*, 113 A.D.2d 763, 493 N.Y.S.2d 355 (2d Dept. 1985); *Weisman* v. *Weisman*, 108 A.D.2d 852, 485 N.Y.S.2d 568 (2d Dept. 1985); *Goldner* v. *Sullivan, Gough, Skipworth, Summers and Smith*, 105 A.D. 1149, 1151, 482 N.Y.S.2d 606, 608 (4th Dept. 1984); *Koster* v. *Chase Manhattan Bank, N.A.*, 609 F. Supp. 1191, 1198 (S.D.N.Y. 1985); tortious harassment, *Schulman* v. *Krumholz*, 81 A.D.2d 883, 439 N.Y.S.2d 160 (2d Dept. 1981); and abuse of process. *Hansen* v. *Petrone*, 124 A.D.2d at 782, 508 N.Y.S.2d at 501.

In short, New York courts look to the essence of the tort, not its label, and apply § 215(3) to intentional personal injury claims and § 214(5) to many, although not all, negligent personal injury claims. *Trott* v. *Merit Department Store*, 106 A.D.2d 158, 159-60, 484 N.Y.S.2d 827, 828-29 (1st

Dept. 1985). *See Noel* v. *Interboro Mutual Indemnity Insurance Co.*, 31 A.D.2d 54, 55, 295 N.Y.S.2d 399, 400 (1st Dept. 1968), *aff'd*, 29 N.Y.2d 743, 326 N.Y.S.2d 396, 276 N.E.2d 232 (1971) (New York courts will not allow plaintiffs to "circumvent the one-year limitation . . . by misdescribing the tort"); *Green* v. *Time, Inc.*, 147 N.Y.S.2d 828, 830 (S. Ct. N.Y. Co.), *aff'd*, 1 A.D.2d 665, 146 N.Y.S.2d 812 (1st Dept. 1955), *aff'd*, 3 N.Y.2d 732, 163 N.Y.S.2d 970, 143 N.E.2d 517 (1957) (*prima facie* tort doctrine limited to intentional injury to trade or property to prevent its use "for the questionable purpose of avoiding the application of the statute of limitations" for intentional personal injury claims).

New York's courts and commentators consistently refer to § 214(5) as "the three-year negligence Statute of Limitations," *Trott* v. *Merit Department Store*, 106 A.D.2d at 159, 484 N.Y.S.2d at 828, and § 215(3) as the provision "governing intentional torts." *Rosner* v. *Maimonides Hospital*, 77 A.D.2d 652, 429 N.Y.S.2d 1022 (2d Dept. 1980). *See Wheeler* v. *State*, 104 A.D.2d 496, 498, 479 N.Y.S.2d 244, 246 (2d Dept. 1984); *Schulman* v. *Krumholz*, 81 A.D.2d 883, 439 N.Y.S.2d at 161; *Castracani* v. *Mahoney*, 132 Misc.2d 276, 277, 503 N.Y.S.2d 666 (S. Ct. Saratoga Co. 1986); Siegel, *New York Practice*, § 35, at 37 (1978); Carmody & Wait, 2 *Cyclopedia of New York Practice*, § 13.74 at 419 (2d ed. 1965); 35 *N.Y. Jur.*, Limitations and Laches § 35 at 527 (1964); McLaughlin, 7B Consolidated Laws of New York Annotated, Supplemental Practice Commentaries, C215:3 at 324 (McKinney 1988 Supp.). *See also Smith* v. *Smith*, 830 F.2d 11, 12 (2d Cir. 1987); *Regan* v. *Sullivan*, 557 F.2d 300, 302 (2d Cir. 1977); *Koster* v. *Chase Manhattan Bank*, 609 F. Supp. at 1198; *Rio* v. *Presbyterian Hospital*, 561 F. Supp. 325, 328

(S.D.N.Y. 1983); *Pratt* v. *Bernstein*, 533 F. Supp. 110, 117-18 (S.D.N.Y. 1981).

After surveying New York's judicial and scholarly constructions of § 214(5) and §215(3), Judge Van Graafeiland concluded that "the two limitations periods actually operate to allow one year for almost every intentional injury to the person, and three years for virtually every unintentional personal injury" (Pet. App. A-10). Thus, New York has two broadly based statutes of limitations that apply to claims for personal injuries. For the reasons discussed above, under this Court's teachings in *Wilson* v. *Garcia*, the one for intentional torts is most analogous to claims under § 1983.

The majority's view below (Pet. App. A-5—A-6) that it had to find which of the statutes was the most "general" is misdirected and results from a misreading of *Wilson* v. *Garcia*. The reference in *Wilson* v. *Garcia* to "[g]eneral personal injury actions" appears in the penultimate paragraph of the opinion where the Court explained that it is "unlikely" that broadly based personal injury limitations would ever be "fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect". 471 U.S. at 279. As Judge Van Graafeiland observed in his dissent (Pet. App. A-12—A-13), that reference was in the context of this Court's explanation why personal injury limitations periods were preferable to ones relating to "wrongs committed by public officials", such as the New Mexico Tort Claims act. This Court plainly intended to distinguish § 1983 from causes of action, for instance, that are not "judicially enforceable in the first instance," that are limited "to a circumscribed set of facts," that "pre-

clude money damages or injunctive relief," *Burnett* v. *Grattan*, 468 U.S. at 50, or that lie only against public officials. *Wilson* v. *Garcia*, 471 U.S. at 279; (Pet. App. A-12). In the relevant sense, §§ 214(5) and 215(3) are equally "general"; it is the substantive distinction between intentional and unintentional personal injury that is dispositive here.

Even on its own terms, the majority below was wrong. The majority, like respondent, did not dispute the reading of New York law that virtually all intentional torts were covered by the one-year provision. Instead, the majority held that is was entitled to disregard New York's courts and commentators in favor of "the plain structure of the New York statutes . . . . By nature section 214(5) is general; section 215(3) is more specific and exceptional." (Pet. App. A-5—A-6.) It appears that 42 U.S.C. § 1988, which directs resort to "the common law, as modified and changed by the constitution and statutes of the State," has never before been construed to permit a § 1983 court to construe state law contrary to "the decisional law of the forum State." *Robertson* v. *Wegmann*, 436 U.S. 584, 589 n.5 (1978). Such a practice would be especially peculiar since no reason appears that time limitations borrowed for § 1983 claims need be statutory at all, as opposed to judge-made. *See* Special Project, Time Bars in Specialized Federal Common Law: Federal Rights af Action and State Statutes of Limitations, 65 Cornell L.J. 1011, 1114-15 & n.12 (1980), and citations therein.

It is also no objection that some intentional personal injury tort might conceivably fall outside the scope of § 215(3) or that some § 1983 claims may be founded upon

something other than intentional misconduct, at least as "intent" is classically defined in tort law. It is sufficient that § 1983 violations are "typically intentional" (Pet. App. A-6) and that § 215(3) applies to "almost every intentional injury to the person" (Pet. App. A-10). This Court has recognized that no state will have a "precise counterpart" to § 1983, and that therefore "*any* analogies to those [state law] causes of action are bound to be imperfect" and "somewhat arbitrary". *Wilson* v. *Garcia*, 471 U.S. at 272 & n.24 (emphasis added; citation omitted). The imperfection of the analogy between § 1983 and causes of action governed by § 215(3) hardly requires resort to § 214(5), which governs causes of action fundamentally different from § 1983 claims.[5]

Because § 1983 was directed primarily at intentional wrongs causing personal injury, and § 215(3) is broadly applicable to intentional personal injury tort claims under New York law, § 215(3) must be applied to § 1983 claims in New York unless it is "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988; *Burnett* v. *Grattan*, 468 U.S. at 48.

---

5. We have previously observed that, judging solely by the states' statutes of limitations on their face, about half of the states distinguish for limitations purposes between all or most intentional personal injuries and all or most unintentional personal injuries. Petition for Certiorari at 5 n.2. Of the states so distinguishing, many have statutes of limitations that are apparently broadly applicable to intentional personal injury torts. *E.g.*, Ala. Code § 6-2-34(1) (1977); D.C. Code Ann. § 12-301(4) (1981); Miss. Code Ann. § 15-1-35 (Supp. 1986); Ohio Rev. Code Ann. § 2305.11 (Anderson Supp. 1985); Wis. Stat. Ann. § 893.57 (West 1983). Other states have intentional tort limitations which are facially less broadly applicable, but which cover the core group of intentional personal injury torts recognized at common law. *E.g.*, Kan. Stat. Ann. § 60-541(2)(1983); Me. Rev. Stat. Ann. tit. 14, § 753 (1980); Mich. Comp. Laws Ann. §§ 600-5805(2), (3), (7) (West 1987); Wash. Rev. Code Ann. § 4.16.100 (1962).

II

Use Of New York's One-Year Limitations Period Is Not Inconsistent With Federal Law.

The third step in the statute of limitations borrowing process is a scrutiny of the analogous statute for inconsistency with federal interests. *E.g., Wilson* v. *Garcia,* 471 U.S. at 267; *Burnett* v. *Grattan,* 468 U.S. at 47-48. To the extent that the court below found such inconsistency with New York's one-year statute, it was also wrong.

Because the majority below held that New York claims governed by the three-year limitation of N.Y.C.P.L.R. § 214(5) are most nearly analogous to § 1983 claims (Pet. App. A-5—A-6), the only remaining question for the majority was whether that three-year period is "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988; *Burnett* v. *Grattan,* 468 U.S. at 48. The majority found that § 214(5) adequately "accommodates" the federal interests underlying § 1983 (Pet. App. A-6—A-7).

The majority went further, however, in the "conclusion" section of its opinion: "the three year limit of section 214(5) more faithfully represents the federal interest in providing an effective remedy for violations of civil rights than does the restrictive one year limit of section 215(3)" (Pet. App. A-7). Although the intent of this statement is not entirely clear, the dissenting judge construed it as "an alternative holding that application of the one-year limitation of § 215(3) would frustrate the purposes of § 1983 because "section 1983 plaintiffs require more than a year to investigate and explore the basis for their claim" (Pet. App.

A-13, A-15). As the dissenting opinion demonstrates, overwhelming authority rejects the proposition that a one-year limitation is inadequate to the compensatory and deterrent purposes of § 1983 (Pet. App. A-13—A-16).[6]

American case law and commentators have found in statutes of limitations "a fairly complex mixture of purposes, some of which overlap and some of which may be partly inconsistent with others." Callahan, Statutes of Limitation—Background, 16 Ohio St. L.J. 130, 132-33 (1955); *see* Special Project, 65 Cornell L. Rev. at 1015-18. For instance, limitations facilitate "[j]ust determinations of fact" by precluding actions after "memories of witnesses have faded or evidence is lost." *Wilson* v. *Garcia,* 471 U.S. at 271; *see* Note, 63 Harv. L. Rev. at 1185; Callahan, 16 Ohio St. L. J. at 133-34. Also, limitations create repose, to the benefit of even a wrongdoer, of those who would deal with him, and of commerce and society in general. *See Wilson* v. *Garcia,* 471 U.S. at 271; Callahan, 16 Ohio St. L.J. at 135-37; Note, 63 Harv. L. Rev. at 1185-86.

The policies underlying statutes of limitations are matters of "importance . . . in the federal as well as in the state [] system . . . ." *Board of Regents* v. *Tomanio,* 446 U.S. 478, 488 (1980); *see Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 136 (1938) (statute of limitations "has long been regarded by this Court and by the courts of New

6. The majority's comparison of §§ 214(5) and 215(3) might have been intended as a selection of the New York personal injury limitations period that balances the federal interests of repose and compensation in a fashion most to the majority's liking, without necessarily implying that § 215(3) is actually inconsistent with any federal interest. However, as Judge Van Graafeiland suggested, limitations borrowing does not permit a broad judicial balancing of the competing interests underlying state statutes of limitations (Pet. App. A-13—A-14, A-17).

York as a meritorious defense, in itself serving a public interest''). Any suggestions that statutes of limitations ''are contrary to the spirit of law and not to be favored . . . are overwhelmed by the weight of judicial declarations attesting to the soundness of their policy.'' Callahan, 16 Ohio St. L.J. at 131 (footnotes omitted).

Manifestly, ''the application of *any* statute of limitations'' would strike a balance between the repose-related policies favoring § 1983 defendants and the compensatory policies favoring § 1983 plaintiffs. *Wilson* v. *Garcia*, 471 U.S. at 271. Any such balance will be ''inevitably arbitrary to some extent'', *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980), because there is no profound sense in which a claim is viable one day but stale the next. Nonetheless, American tradition has been to prescribe limitations periods legislatively, for application equally to all claims of the same type. Courts are not free to reject a statute of limitations based upon a judicial preference for a balance of policies different than the balance struck by the legislature.

Limitations borrowing under § 1988 falls within this tradition. The borrowing process selects the state statute of limitations most analogous to § 1983—that is, the limitation that would apply to the typical § 1983 claim had that claim been asserted in state court under state law—and ''incorporates the *State's* judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action.'' *Wilson* v. *Garcia*, 471 U.S. at 271 (emphasis added); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975) (''In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the

State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim'').

The borrowing process detailed in *Burnett* v. *Grattan* accommodates both the deference to a state's judgment as to the appropriate limitations period for analogous state law claims, and the '' 'predominance of the federal interest' in the borrowing process, taken as a whole.'' *Wilson* v. *Garcia*, 471 U.S. 269, quoting *Burnett* v. *Grattan*, 468 U.S. at 48. The purpose of resort to state law is ''to assure that neutral rules of decision will be available to enforce the civil rights actions, among them § 1983.'' *Wilson* v. *Garcia*, 471 U.S. at 269. A borrowed state rule may not be rejected merely because it favors one side or the other in litigation, *Robertson* v. *Wegmann*, 436 U.S. at 593, but ''only if the state law is inconsistent with the Constitution and laws of the United States.'' *Board of Regents* v. *Tomanio*, 446 U.S. at 485 (quotation omitted). In particular, a state statute of limitations is not merely ''a technical obstacle to be circumvented if possible,'' *id.* at 484, and cannot be rejected merely because a judge might prefer a shorter or a longer limitation period. Instead, the most analogous state statute of limitations can be rejected only where it would permit claims so old as to offend ''the genius of our laws,'' *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 341 (1805), quoted in *Wilson* v. *Garcia*, 471 U.S. at 271, or where it provides a period so short as to deny a prospective plaintiff ''a reasonable time to sue,'' thus frustrating the purposes of § 1983. *Campbell* v. *Haverhill*, 155 U.S. 610, 615 (1895), quoted in *Burnett* v. *Grattan*, 468 U.S. at 53 n.15.

Taking all of these considerations into account, there would be no basis for finding any inconsistency between using New York's one-year intentional tort statute of

limitations and federal law. Indeed, numerous courts have applied one-year state personal injury statutes of limitations to § 1983 claims after this Court's decision in *Wilson* v. *Garcia*. *E.g.*, *Walker* v. *City of Bowling Green*, 803 F.2d 722 (6th Cir. 1986) (Kentucky; unpublished opinion); *Berndt* v. *State of Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986) (Tennessee); *McMillan* v. *Goleta Water District*, 792 F.2d 1453, 1456 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1348 (1987) (California); *Washington* v. *Breaux*, 782 F.2d 553, 554 n.1 (5th Cir. 1986) (per curiam) (Louisiana); *Mulligan* v. *Hazard*, 777 F.2d at 343-44 (Ohio); *Gates* v. *Spinks*, 771 F.2d at 919-20 (Mississippi); *Altair Corp.* v. *Pesquera DeBusquets*, 769 F.2d 30, 31-32 (1st Cir. 1985) (Puerto Rico); *Fowler* v. *City of Louisville*, 625 F. Supp. 181 (W.D. Ky. 1985), *aff'd without op.*, 803 F.2d 719 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1375 (1987) (Kentucky). With the apparent exception of the court below, "[n]o Court of Appeals confronting this issue since *Wilson* has held that a one-year personal injury limitation period would be inherently too short" (Pet. App. A-14).

This result is not surprising in light of this Court's observation, in strong terms, that it is "most unlikely" that a limitations period applicable to personal injury claims "ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." *Wilson* v. *Garcia*, 471 U.S. at 279.[7] That observation applies fully to use of New York's

7. The Court's observation that personal injury limitations periods are unlikely to be designed to impair § 1983 claims is borne out here by the legislative history of § 215(3). As Judge Van Graafeiland indicated, New York's legislature fixed the intentional personal injury tort limitations at one year based upon its view of the proper balance between remediation and repose in state law claims—not based upon any desire to impair federal claims. *See* Pet. App. A-9, quoting Second Preliminary Report of the Advisory Committee on Practice and Procedure, Leg. Doc. No. 13, at 537-38 (1958).

§ 215(3), because that provision is generally applicable to state law intentional personal injury claims—not only against private defendants, but against public officials, who can be sued in New York's courts of general jurisdiction, *see* *Morell* v. *Balasubramanian*, 70 N.Y.2d 297, 520 N.Y.S.2d 530, 514 N.E.2d 1101 (1987), and against the state itself, which can be sued in New York's Court of Claims. *E.g.*, *Trayer* v. *State*, 90 A.D.2d 263, 268-69, 458 N.Y.S.2d 262, 265 (3d Dept. 1982).

Moreover, the Court in *Wilson* was surely aware that, on at least four occasions, it had "sanctioned periods as brief as one year." Note, 61 Notre Dame L. Rev. at 449 n.80; *see Chardon* v. *Fumero Soto*, 462 U.S. 650, 654 (1983) (Puerto Rico; § 1983 claim); *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (same); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (Tennessee; 42 U.S.C. § 1981 claim); *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914) (Louisiana; § 1983 claim). To this day, the jurisdictions at issue in those cases, as well as California, have one-year statutes of limitations applicable to all personal injury, both intentional and unintentional. Cal. Civ. Proc. Code § 340(3) (West 1988); La. Civ. Code Ann. art. 3492 (West 1988 Supp.); P.R. Laws Ann. tit. 31, §§ 5298 (1968); Tenn. Code Ann. § 28-3-104 (1980). If a one-year limitation is too short for § 1983 claims, then the holding of *Wilson* v. *Garcia* is meaningless in California, Louisiana, Puerto Rico and Tennessee, and new borrowing rules must be developed specially for those jurisdictions.

There is also strong evidence that Congress would not have rejected a one-year limitation as too short. Congress explicitly included a one-year limitation period in the provision that became 42 U.S.C. § 1986. That provision, which

prohibits certain failures to prevent civil rights violations by others, applies to actors often much harder for plaintiffs to identify than are § 1983 violators; yet Congress found a one-year limitation to be adequate. Congressional willingness to impose a one-year limitation for § 1986 claims provides convincing evidence that use of the same period for § 1983 claims is not inconsistent with federal law. *Burnett* v. *Grattan*, 468 U.S. at 61 (Rehnquist, J., concurring in the judgment).

Finally, there is no reason to conclude that a one-year limitation is too short to "take into account practicalities that are [illegible]ed in litigating federal civil rights claims . . . ." *Burnett* v. *Grattan*, 468 U.S. at 50. The "practicalities" of § 1983 litigation are not fundamentally different than those of intentional tort litigation. Such intentional tort claims are often appended to § 1983 claims, so that "plaintiff will want to commence suit within one year in any event" (Pet. App. A-15). As Judge Van Graafeiland observed, liberalized modern federal rules of pleading and practice have reduced the obstacles a § 1983 plaintiff must overcome before proceeding to court (Pet. App. A-15). The Court can take judicial notice that the one-year limitation applicable to § 1983 claims in state such as California, which is a prodigious source of civil rights litigation, has amply accounted for the "practicalities" of such litigation.

The majority below was concerned that a prospective § 1983 plaintiff may not know of his injury, or may not recognize its constitutional dimension, in time to bring suit (Pet. App. A-6—A-7). It can be conceded that "a tiny fraction of the victims of civil rights violation" do not promptly recognize their injuries (Pet. App. A-15). It can similarly be conceded that some prospective plaintiffs, recognizing

their injuries, will not promptly recognize the constitutional dimension of the wrong, or the identity of the wrongdoer. Nonetheless, such a prospective plaintiff is not without protection. First, the plaintiff benefits from applicability of state law tolling rules. *E.g.*, *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-86 (1980). Moreover, absence of any state tolling rules in certain circumstances may violate federal interests such that federal law will supply a tolling rule. *Cf. Chardon* v. *Fumero Soto*, 462 U.S. at 661 (suggesting that vindication of federal interest in class-action procedure requires that *some* tolling rule apply in favor of unnamed plaintiffs upon denial of class status or dismissal of class action other than on the merits). Second, the plaintiff enjoys the protection of federal rules governing accrual of § 1983 claims.[8] Those rules are judge-made rules, and therefore will be sufficiently flexible to accommodate the circumstances that concerned the majority below.

Especially given the ameliorative effects of federal accrual rules and state tolling rules, a one-year statute of limitations cannot be rejected because of a hypothetical possibility that some future plaintiff may be unfairly

8. This Court has not explicitly held that time of accrual of a § 1983 claim is governed by federal law, but such a rule is implicit in the holding of *Chardon* v. *Fernandez*, 454 U.S. 6, 7-8 (1981) (*per curiam*). It is apparently universally accepted that federal law governs accrual of § 1983 claims, and that such claims accrue when the plaintiff knows or should reasonably know of his injury. *E.g.*, *Fernandez* v. *Chardon*, 648 F.2d 765, 767 (1st Cir.), *rev'd on other grounds*, 454 U.S. 6 (1981); *Singleton* v. *City of New York*, 632 F.2d at 191; *Deary* v. *Three Un-Named Police Officers*, 746 F.2d 185, 197 n.16 (3d Cir. 1984); *Bireline* v. *Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979); *Lavellee* v. *Listi*, 611 F.2d 1129, 1130 (5th Cir. 1980); *McCune* v. *City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988); *Gibson* v. *United States*, 781 F.2d 1334, 1340 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 928 (1987); *Newcomb* v. *Ingle*, 827 F.2d 675, 678 (10th Cir. 1987); *Calhoun* v. *Alabama Alcoholic Beverage Control Board*, 705 F.2d 422, 424 (11th Cir. 1983); Special Project, 65 Cornell L. Rev. at 1092-94.

treated—a possibility that in any event would be only diminished, not removed, by selection of a longer statute of limitations. Instead, it is sufficient that § 215(3) is not "generally . . . inhospitable" to § 1983 actions and that a one-year limitation for § 1983 claims is not "in general inconsistent" with the policies underlying § 1983. *Robertson* v. *Wegmann*, 436 U.S. at 591, 594.

Conclusion

Because the present suit was commenced more than one year after the cause of action accrued, and because New York's one-year statute of limitations for intentional personal injury actions is the appropriate statute of limitations for application to § 1983 claims in New York, the action is time-barred. Therefore, the judgment of the Court of Appeals should be reversed with directions that the action be dismissed.

Dated: New York, New York
May 26, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway
New York, New York 10271
(212) 341-2020

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

CHARLES R. FRASER
Assistant Attorney General

Of Counsel

RESPONDENT'S

BRIEF

[redacted]

In the

Supreme Court of the United States

OCTOBER TERM, [redacted]

JAVAN OWENS and DANIEL G. LEBARD,

Petitioners,

—against—

TOM U.U. OBURN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

[redacted]

KENNETH KIMERLING
Counsel of Record
PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.
99 Hudson Street - 14th Fl.
New York, New York 10013
(212) 219-3360

ARTHUR N. EISENBERG
NEW YORK CIVIL LIBERTIES UNION
132 W. 43rd Street
New York, New York 10036
(212) 382-0557

Counsel For Respondent

QUESTIONS PRESENTED

1. Whether under *Wilson* v. *Garcia*, 471 U.S. 261 (1985) the general personal injury state statute of limitations must be adopted for actions under 42 U.S.C. § 1983?

2. Whether a decision overruling established precedent and shortening the limitations period for filing § 1983 claims should be applied prospectively?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-56

JAVAN OWENS and DANIEL G. LESSARD,

Petitioners,

—against—

TOM U.U. OKURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinions of the lower courts are reported as *Okure* v. *Owens*, 625 F.Supp. 1568 (N.D.N.Y. 1986), *aff'd*, 816 F.2d 45 (2d Cir. 1987). These opinions are reproduced in the appendix to the petition for certiorari.

STATEMENT OF THE CASE

On January 27, 1984 the respondent Tom U.U. Okure was lawfully on the Albany campus of the State University of New York. On that date, he was arrested without cause by petitioners who were members of the University Police and acting under color of state law. In the process of the arrest and detention,

petitioners beat and battered the respondent. Respondent sustained physical injuries including a broken tooth and sprained finger and also suffered mental anguish as the result of respondents' violation of his constitutional rights.[1]

Respondent filed his complaint for violation of his constitutional rights, pursuant to 42 U.S.C. § 1983, on November 13, 1985. Petitioners moved to dismiss the complaint as untimely, contending that § 1983 actions were governed by the one-year limitation covering certain specified intentional torts, New York Civil Practice Law and Rules ("CPLR") § 215(3). Following the mandate of this Court in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), the District Court denied petitioners' motion. It found that the general personal injury tort provision with a three year limitations period, CPLR § 214(5), applied. A22-25. Furthermore, the District Court held that the one-year limitation set forth in CPLR § 215(3) "would improperly restrict the scope of § 1983 and controvert federal policy." A25.

On appeal, the Second Circuit agreed with the District Court that CPLR § 214(5), the three year general provision covering personal injury actions, applied in § 1983 actions. By its express terms, CPLR § 214(5) governs "an action to recover damages for personal injury except as provided in section 214-b, 214-c and 215." CPLR § 214(5) (McKinney Supp. 1988). By contrast, CPLR § 215(3), which petitioners rely on covers the following specified causes of actions: "assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy." This provision is one of the exceptions to the general provision, CPLR § 214(5). The other exceptions are: CPLR § 214-b (two years) covering claims for contact with or exposure to phenoxy herbicides ("Agent Orange"); and CPLR § 214-c (three years)

---

1 These facts are taken from respondent's Complaint, JA 5-6, and must be accepted as true in reviewing a motion to dismiss. *See Conley* v. *Gibson*, 355 U.S. 41 (1957). References to "JA" are to pages in the joint appendix. The orders and opinions in the courts below were reproduced in the appendix to the petition for certiorari, cited herein as "A".

covering claims for exposure to other unspecified substances like asbestos. In addition, there are two separate provisions for malpractice claims for both property and personal injury: CPLR § 214-a (two years six months) covering the malpractice of doctors, dentists and podiatrists, and CPLR § 214(6) (three years) covering malpractice by others.

The Second Circuit rejected petitioners' argument that the specific intentional tort provision, CPLR § 215(3), should be considered the general tort remedy for personal injury. It found:

> By nature, section 214(5) is general; section 215(3) is more specific and exceptional. The dichotomy survives no matter how many similar intentional torts are judicially added to those enumerated in section 215(3).

A6.

The Court of Appeals then considered both CPLR § 214(5) and CPLR § 214(3) and found that § 214(5) is more appropriate for § 1983 litigation and consistent with federal law.

> We are not persuaded that because personal injuries actionable under section 1983 are typically intentional, they are necessarily apparent to the victim at the time they are inflicted. Many injuries to personal rights are less visible than the simple battery alleged here. We need only consider the examples of valid section 1983 claims catalogued in *Wilson* . . .
>
> Even where the injury itself is obvious, the constitutional dimensions of the tort may not be. This situation might arise where it is unclear that the tortfeasor acted under color of state law or that the act was illegal. It may be that the legality of the act complained of has not previously been adjudicated. Because recognition problems such as these are endemic in section 1983 litigation, we believe that there must be time for plaintiffs to reflect and to probe. The three year period of limitations provided by

N.Y.C.P.L.R. § 214(5) accomodates the many complex section 1983 claims.

A6-7 (Footnote omitted).

One Judge dissented from the opinion.

SUMMARY OF ARGUMENT

This Court in *Wilson* v. *Garcia*, 471 U.S. 261 (1985) sought to end the confusion and concomitant litigation in the lower courts over the appropriate limitations period for § 1983 actions. It directed that all courts should adopt the forum state's statute of limitations for "general personal injury actions, sounding in tort." *Id.* at 279. This mandate was premised on the need for a "simple, broad characterization." *Id.* at 272. In addition, the Court believed that given the large volume of personal injury litigation, the statute of limitations for general personal injury actions would not now or in the future be "fixed in a way that would discriminate against federal claims." *Id.* at 279. Rather the Court believed that adoption of the general personal injury provision would provide uniformity and certainty in the lower courts and end unnecessary litigation. *Id.* at 279. The Second Circuit correctly followed *Wilson* adopting New York's three year general personal injury provision, CPLR § 214(5), as the appropriate limitations period for § 1983 actions.

Petitioners' arguments in favor of the intentional tort statute of limitations would undermine everything sought to be accomplished in *Wilson*. The intentional tort provisions in New York and elsewhere are not "broad" but specific, typically embracing only a handful of delineated torts. Moreover, they are susceptible to being fixed in a way that would discriminate against federal claims precisely because they do not involve a large volume of litigation. Most importantly, petitioners' approach would again create uncertainty and immerse the lower courts in continuing litigation over what is the appropriate statute of limitations. There is only one general personal injury provision in every jurisdiction. There is no such uniformity among intentional torts statutes of limitations. There are only 33 jurisdictions that have one. In all, except one of those jurisdictions, there are two or more provisions covering intentional torts. The lower courts will have to decide which one of the intentional tort provisions should apply. Even mandating the intentional tort provision that covers *most* intentional torts will not end the litigation, as in many states that is not clear. Only by adhering to the decision in *Wilson* mandating the adoption of the general tort provision will this unnecessary litigation be avoided.

Furthermore, the personal injury statute of limitations most analogous to § 1983 claims is the general tort provision and not any specific intentional tort provision. The statutes of limitations in effect in 1871 were derived in large part from the English Limitations Act of 1623. That Act and most state statutes in effect in 1871 provided for separate limitations periods for trespass actions (assault, battery and false imprisonment) and actions on the case (other personal injury torts). The distinction between trespass and action on the case is not intentional versus nonintentional torts, but rather injuries resulting from direct force and injuries not resulting from direct force. The classic illustration of the difference between trespass and action on the case is that of a log thrown on a highway. A person who is struck by the log as it fell could maintain trespass against the thrower, since the injury was direct; but one who was hurt by stumbling over the log as it lay in the road could only maintain an action on the case.

While the 1871 Congress was concerned with direct violence—the trespass torts of the Klu Klux Klan—§ 1983 was not directed at the Klan itself. Rather § 1983 was aimed at the Southern states and their unwillingness and inability to provide a remedy for the Klan violence. Action on the case statutes of limitations would cover the indirect personal injuries caused by the State. Congress itself specified "action on the case" for claims under 42 U.S.C. § 1986, a limited but parallel provision of the Civil Rights Acts of 1871. Thus, in 1871 Congress would have found that the statutes of limitations covering action on the case would have applied to § 1983 actions.

Today's general personal injury statutes of limitations are the descendants of the action on the case provisions. Indeed, in 1871, as today, they cover the broad range of personal injuries that comprise most constitutional claims. As this Court found in *Wilson*, these general provisions provide the best analogy to § 1983.

Finally, New York's three year statute of limitations for general personal injury actions is more appropriate to § 1983 actions than the one year provision for specified intentional torts. The period of limitations for intentional torts was purposely made short because New York believed that the injuries from intentional torts were promptly known. Such a truncated period is inappropriate to the broad remedial purposes of § 1983 actions. The practicalities of constitutional litigation require a longer period. Recognizing that one's constitutional rights have been violated and preparing to litigate that claim requires more time than recognizing that one has been the victim of an intentional tort and filing a tort claim. New York's one year provision in effect discriminates against § 1983 claims.

Respondent argues alternatively, that if the Court finds that New York's one year statute of limitations for intentional torts should apply in § 1983 actions, that decision should be applied prospectively only. At the time of respondent's injury, there was clear Second Circuit precedent that a three year statute applied to § 1983 claims in New York and that nothing less than two years would ever be found consistent with federal law. In reliance on that precedent, respondent filed within two years of the accrual of his claim. Using the criteria of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), it would be inequitable to retroactively apply a one year statute of limitations to bar respondent's claim.

ARGUMENT

POINT I

THE DECISION BELOW CORRECTLY APPLIES NEW YORK'S STATUTE OF LIMITATIONS FOR "GENERAL PERSONAL INJURY ACTIONS" TO § 1983

In *Wilson* v. *Garcia*, 471 U.S. 261 (1985) this Court sought to end the confusion and the resulting litigation that had developed in the lower courts in selecting the appropriate state statute of limitations for § 1983 actions. The Court, therefore, adopted a bright line rule requiring that for all § 1983 actions, the lower courts adopt the forum state's statute of limitations for "[g]eneral personal injury actions, sounding in tort." *Id.* at 279.

The Court reached this conclusion for a number of reasons. First, it saw the general personal injury provision as broad enough to cover the many different types of claims brought in § 1983 actions. As the Court stated, a "simple, broad characterization of all claims best fits the statute's remedial purpose." *Id.* at 272. Second, it believed that given the large volume of personal injury litigation, it would be unlikely that this provision would now or in the future be "fixed in a way that would discriminate against federal claims." *Id.* at 279. Third, the Court believed that this choice was supported by "the federal interest in uniformity, certainty, and the minimization of unnecessary litigation." *Id.* at 275.

Petitioners' challenge to the decision below is inconsistent with the holding of *Wilson* and undermines the uniformity and certainty this Court sought. It was correctly rejected by the court below.

A. Wilson Requires The Adoption Of New York's General Personal Injury Statute Of Limitations

Petitioners' principal contention is that *Wilson* does not require adoption of the forum state's statute of limitations for

"general personal injury actions" in § 1983 cases, but rather directs the use of the most analogous tort provision in each jurisdiction. That provision, they claim, is the one that covers intentional torts. Petitioners misconstrue *Wilson* and disregard the reasoning behind it.

Wilson's reference to the limitations period for "general personal injury actions" was neither casual nor careless, as petitioners seemingly suggest. To the contrary, this Court was deliberately seeking a "broad characterization of all [§ 1983] claims;" one that would "constitute a major part of the total volume of civil litigation" and thus not be "fixed in a way that would discriminate against federal claims"; and one that would serve "the federal interest in uniformity." *Id.* at 272, 279, 270. Mindful of these goals, the Court did not direct that the statute of limitations that covered intentional torts be selected. Nor did the Court overlook the distinction. Indeed, *Wilson* noted that the case before it could be characterized as involving a claim for "false arrest, assault and battery, or personal injuries." *Id.* at 272. Nevertheless, the Court chose to define that claim and all other § 1983 claims as ones for personal injury and not for the intentional torts of assault and battery or false arrest.

The Court's broad characterization of § 1983 claims as general personal injury torts was in direct response to the undesirable experience of trying to draw precise analogies to common law claims based on the particular facts alleged in each complaint.

> . . . [P]ractical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose. The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983. Almost every § 1983 claim can be favorably analogized to more than one

> of the ancient common-law forms of action, each of which may be governed by a different statute of limitations.

Id. at 272-273 (footnote omitted). Petitioners attempt to resurrect this rejected practice by arguing that *Wilson* requires the lower courts to find the personal injury statute of limitations that provides the best analogy to § 1983 claims. The Court was clear that,

> [§ 1983] can have no precise counterpart in state law. *Monroe* v. *Pape*, 365 U.S. at 196 n.5, (Harlan, J., concurring). Therefore, it is "the purest coincidence," *ibid*, when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect.

Id. at 272 (footnote omitted). *Wilson* did not want the lower courts to again be immersed in litigation over the appropriate analogy as petitioners argue. The *Wilson* decision made the correct analogy, general personal injury claims.

The Second Circuit is among the majority of courts that have interpreted *Wilson* as requiring the application of the general personal injury limitations period for § 1983 claims. There are 33 jurisdictions that have both a general statute of limitations for personal injuries and a statute (or statutes) with a different limitation period that specifically designate one or more intentional torts.[2] With few exceptions, the Circuit Courts have chosen the provision that generally applies to personal injury claims rather than the provision that designates specific intentional torts.[3]

---

2 These statutes are set out in Appendix A in this brief.

3 *Meade* v. *Grubbs*, 841 F.2d 1512 (10th Cir. 1988) (Oklahoma); *Banks* v. *Chesapeake and Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986) (dicta) (District of Columbia); *Small* v. *Inhabitants of the City of Belfast*, 796 F.2d 544 (1st Cir. 1986) (Maine); *Carroll* v. *Wilkerson*, 782 F.2d 44 (6th Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 330 (1986) (Michigan); *contra Mulligan* v. *Hazard*, 777 F.2d 340

Petitioners' argument, if accepted, would destroy the uniformity the Court sought to create in *Wilson*, and concomitantly reinstate the confusion and the extensive collateral litigation that the Court sought to end. There is no uniformity in the states' intentional tort statutes of limitations. Some states have none, some—including New York—have more than one; some statutes cover one intentional tort, some cover many, and some are in between.[4] For example, Tennessee has a separate provision for slander, Tenn. Code Ann. § 28-3-103 (1980); however, another provision covers "libel," "false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise" and "injuries to the person," Tenn. Code Ann. § 28-3-104 (1980). In Arizona, there is a separate statute for malicious prosecution, false imprisonment, libel

(6th Cir. 1986), *cert. denied*, 106 S.Ct. 2902 (1986) (Ohio); *Gates* v. *Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) (Mississippi); *Jones* v. *Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986) (Alabama).

In addition, contemporaneous with its decision in *Wilson* v. *Garcia*, the Tenth Circuit rejected the state statute of limitations for intentional torts in *Hamilton* v. *City of Overland Park, Kansas*, 730 F.2d 613 (10th Cir. 1984) (*en banc*) *cert. denied*, 471 U.S. 1052 (1985) (Kansas); *McKay* v. *Hammock*, 730 F.2d 1366 (10th Cir. 1984) (*en banc*) (Colorado); *Mishmash* v. *Murray City*, 730 F.2d 1367 (10th Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1052 (1985) (Utah). The Tenth Circuit reaffirmed these holdings after *Wilson*. *Meade* v. *Grubbs*, *supra*.

Finally, a number of Circuit Courts have upheld the choice of the general tort provision without any discussion of a state's intentional tort statute of limitations, even after decisions in the Fifth, Sixth, and Eleventh Circuit Courts in *Mulligan*, *Gates* and *Jones*. *Marks* v. *Parra*, 785 F.2d 1419 (9th Cir. 1986) (Arizona); *Lyons* v. *Goodson*, 787 F.2d 411 (8th Cir. 1986) (Arkansas); *Kornegay* v. *Burlington Industries, Inc.*, 803 F.2d 787 (4th Cir. 1986) (North Carolina); *Hughes* v. *Sheriff of Fall River County Jail*, 814 F.2d 532 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 46 (1988) (South Dakota); *Berndt* v. *State of Tennessee*, 796 F.2d 879 (6th Cir. 1986) (Tennessee); *Kline* v. *North Texas State University*, 782 F.2d 1229 (5th Cir. 1986) (Texas). Significantly, the last two of these decisions are in Circuits that found intentional tort provisions applicable in other states.

4 Only one jurisdiction has a statute that explicitly covers all intentional torts. Wisc. Stat. Ann. § 893.57 (West 1983).

and slander, Ariz. Rev. Stat. Ann. § 12-541 (1956), but it does not cover assault and battery, which are included in the general provision for "injuries done to the person of another," Ariz. Rev. Stat. Ann. § 12-542 (Supp. 1987). In Michigan, there is a one year statute of limitations for libel and slander, a two year statute for assault and battery, false imprisonment, and malicious prosecution, and a three year statute for all other injuries to the person. Mich. Stat. Ann. § 27A. 5805 (1988). In Maryland, there is a statute of limitations for assault, battery, libel and slander, Md. Cts. & Jud. Prac. Code Ann. § 5-105 (1984); all other torts, including intentional torts, are covered in a residual provision, Md. Cts. & Jud. Prac. Code Ann. § 5-101 (1984).

Thus, the Court cannot merely designate the statute of limitations that covers "intentional torts" as appropriate for § 1983 cases because there is only a single jurisdiction that has just one. Nor can the Court designate the provision that covers "most intentional torts," because this will only create additional uncertainty as to the definition of "most." What does one do in Alabama? It has a six year statute of limitations for "trespass to person or liberty, such as false imprisonment or assault and battery," Ala. Code § 6-2-34 (1977), and a two year statute of limitations for "malicious prosecution," "seduction," and "libel or slander," Ala. Code § 6-2-38(h)(i)(k) (Supp.1987). Does one include in the count of intentional torts such archaic causes of action as "criminal conversation" and "alienation of affection?" *See* Ark. Code Ann. §§ 16-56-104(2) and (3) (1987). Does one have to review the forum state's judicial decisions to determine where newer intentional torts are covered? For example, the personal injury tort of "intentional infliction of emotional distress" is apparently included in CPLR § 215(3) in New York by judicial construction,[5] but excluded by judicial construction for the similar specified intentional tort statute of lim-

5 *Hansen* v. *Petrone*, 124 A.D. 2d 782, 508 N.Y.S. 2d 500 (2d Dept. 1986).

itations in the District of Columbia.[6] Does one decide by examining the *kind* of intentional torts covered to determine which are more like "constitutional torts?" Or does one choose the statute under which the most cases for intentional torts have been filed? Adopting petitioners' argument might settle matters in New York, but nationwide it would once more set in motion the same unpredictable course of state-by-state trial court litigation and appellate review that *Wilson* hoped to put to an end. 471 U.S. at 272.

It is only by adhering to its designation of the general personal injury provision as the "simple, broad characterizations" of § 1983 cases that this Court can avoid another round of time consuming and unnecessary litigation. *Every* state or territory has one such statute. They come in two forms. There are states that have general provisions covering personal injuries that may or may not be subject to specified exceptions.[7] Other states have a residual statute, like that in the District of Columbia, governing actions including personal injury "for which a limitation is not otherwise specially prescribed . . ." D.C. Code Ann. § 12-301 (1981). In either form these provisions are easily identified by their language or application and will ensure an end to the confusion and litigation over this issue.

The clear language and the underlying policy of *Wilson* reject the notion that the statute of limitations is to be determined with reference to the underlying factual character of the § 1983 claim. Yet, it is precisely this kind of factual analogy that underlies petitioners' argument about the intentional character of § 1983 actions. However, even if the Court abandoned its

---

6 *Burda* v. *National Association of Postal Supervisors*, 592 F.Supp 273 (D.D.C. 1984), *aff'd*, 771 F.2d 1555 (D.C. Cir. 1985).

7 These provisions are expressed typically in several ways "For injuries done to the person of another . . ." Ariz. Rev. Stat. Ann. § 12-342(1) (Supp. 1987) or "An injury to the rights of the plaintiff, not arising on contract and not herein enumerated . . ." Wyo. Stat. Ann. § 1-3-105 (1977) or similarly "All actions founded upon any . . . liability not under seal and not in writing . . ." Ark. Code Ann. § 16-56-105 (1987).

Wilson rationale, intentional tort statutes of limitations would not be the most analogous to § 1983 actions.

B. Section 1983 Claims Are Not Analogous To Intentional Torts

Petitioners' argument that intentional torts are a better analogy to § 1983 claims than other personal injury torts misperceives and mischaracterizes § 1983 claims. As this Court has repeatedly recognized, § 1983 covers a broad range of claims that have little or nothing to do with what the common law has traditionally regarded as an intentional tort.

> A catalog of . . . constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of school children, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or a sufficient opportunity to be heard—to identify only a few.

Wilson, 471 U.S. at 273 (footnotes omitted). *See also Felder* v. *Casey*, 56 U.S.L.W. 4689, 4693 n.3 (June 22, 1988); Blackmun, "Section 1983 and Federal Protection of Individual Rights," 60 N.Y.U. L. Rev. 1, 19-20 (1985). These claims, as well, have little or nothing to do with traditional tort notions of intentionality. The presence or absence of a deliberate act is not dispositive. Negligence does not mean the absence of deliberate actions. Negligence acts are often deliberate. W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts*, § 31, at 171 (5th ed. 1984) ("Prosser").

Moreover, while motive or purpose is often key to many constitutional inquiries it is often irrelevant to most intentional torts. Thus, a battery is committed when one shoots a gun and injures another regardless of any motive to cause injury. *Trott* v. *Merit Department Store*, 106 A.D.2d 158,484 N.Y.S.2d 827 (1st Dept. 1985). On the other hand, in Eighth Amendment claims, the focus is not on the deliberateness of the acts causing

the injury, but on the question of the purpose or malice of defendant's acts. *See Whitley* v. *Albers*, 475 U.S. 312 (1986). Similarly, a state may act deliberately, yet lack the invidious intent to violate the Equal Protection Clause. *See Washington* v. *Davis*, 426 U.S. 229 (1976). But even when motive may be at issue in an intentional tort, it may be different from motive at issue in some constitutional claim. Cf. *Hustler Magazine* v. *Falwell*, 108 S.Ct. 876, 880-891 (1988) (distinguishing common law "malice" from constitutional "malice" in the First Amendment context).

Finally, for claims of Due Process violations, both procedural and substantive, this Court has yet to decide whether deliberateness is needed to prove a violation. *Daniels* v. *Williams*, 474 U.S. 327, 334 n.3 (1986) and *see Davidson* v. *Cannon*, 474 U.S. 344, 349 and 353 (1986) (Brennan, J. dissenting and Blackmun, J. joined by Marshall, J. dissenting).

Petitioners' focus on the word "intent" is, therefore, simplistic and misleading.

The history of § 1983 strongly supports the adoption of the general personal injury statute of limitations. Petitioners make much of the 42nd Congress's concern about the violent acts of the Ku Klux Klan--clearly intentional, and often analogous to the torts of assault, battery and false imprisonment. But they overlook the fact that § 1983 was not directed against the Klansmen who perpetrated these acts but against the officials of the former Confederate states who failed to respond to the Klan's reign of private bloodshed and intimidation.

> While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created [in § 1983] was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law.

Monroe v. *Pape*, 365 U.S. 167, 175-76 (1961) (emphasis in original) (footnote omitted). Thus, the focus of § 1983 was not on

the violence of the Klan[8] but on the states' denial of due process and equal protection of the laws.[9]

The nature of personal injury statutes of limitations in 1871 also supports respondent's position despite petitioners' attempt to misrepresent it. Almost all of the states at that time had statutes of limitations that derived from the English Limitations Act of 1623.[10] That Act divided personal injury claims into three separate limitations period.[11] Claims for "actions upon

---

8 The remedy directed against the Klan itself was section 2 of the 1871 Act, 42 U.S.C. § 1985.

9 Section 1983 had three aims. First, it overrode discriminatory state legislation. Second, it provided a remedy where state law was inadequate. Third, it provided a federal remedy where the state law was adequate in theory, but unavailable in practice. *Monroe*, 365 U.S. at 173-174. While all three aims involved personal injury to blacks, none involved intentional torts by the state.

10 Angell, J.K., *A Treatise on the Limitations of Actions at Law*, Little, Brown, & Co. (5th ed. 1869) at 13-14; Buswell, H.F., *Statutes of Limitation and Adverse Possession*, Little, Brown, & Co. (1889) at 14-16.

11 The English Limitations Act of 1623, 21 James I. Ch.16 (1623) provided in pertinent part:

> III. And be it further enacted, That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action, *sur trover*, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say, (2) the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit* . . . within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery,

the case" had a 6 year statute of limitations. Actions for "trespass of assault, battery, wounding and imprisonment" had a 4 year statute of limitations. Finally, action on the case claims based on spoken words, such as slander, had a two year statute of limitations. These divisions were adopted by almost all the states[12] with few exceptions.[13] While several states treated libel and slander similarly and collapsed the time periods for these claims into those for trespass, they generally kept the distinction between action on the case and trespass. Intentional torts for malicious prosecution or criminal conversation were treated the same as other actions on the case claims and not added to the trespass claims. *See, e.g.*, §§ 71 and 73, 1848 N.Y. Laws 47, Appendix B.

The essential difference between action on the case claims and trespass claims is not intentional versus negligent acts. Rather, it is between direct force and indirect injury.

> Trespass was the remedy for all forcible, direct and immediate injuries, whether to person or to property. Trespass on the case, or the action on the case, as it came to be called, developed . . . as a supplement to the parent action of trespass, designed to afford a remedy for obviously wrongful conduct resulting in injuries which were not forcible or not direct. The distinction between the two lay in the immediate application of force to the person or property of the plaintiff, as distinguished from injury through some obvious and visible secondary cause. The classic illustration of the difference between trespass and

---

wounding, imprisonment, or any of them . . . within four years next after the cause of such actions or suit, and not after; (4) and the said actions upon the case for words . . . within two years next after the words spoken, and not after.

12 The statutes of limitations in effect in 1871 are set forth in Appendix B to this brief.

13 Delaware, Indiana, Iowa, Louisiana, Maryland, Ohio, Oregon, Texas, Virginia, West Virginia, and the territories of Idaho and Nevada had only one limitations period for trespass and action on the case.

> case is that of a log thrown into the highway. A person struck by the log as it fell could maintain trespass against the thrower, since the injury was direct; but one who was hurt by stumbling over it as it lay in the road could maintain not trespass, but an action on the case.
>
> The distinction was not one between intentional and negligent conduct. The emphasis was upon the causal sequence, rather than the character of the defendant's wrong. Trespass would lie for all direct injuries, even though they were not intended, and the action on the case might be maintained for those which were intended but indirect.

Prosser at 29-30 (footnotes omitted); *see similarly* Posner, Richard A., *Tort Law* (1982) at 14-15. Trespass actions included claims involving direct physical force applied by the defendant to the plaintiff—assault and battery and false imprisonment. On the other hand, malicious prosecution and slander are intentional torts, but not trespass, because there is no direct physical force involved.[14]

This essential direct force/indirect injury distinction demonstrates that § 1983 claims would have been treated as action on the case in 1871. As indicated above, § 1983 was enacted, in part, as a remedy against the Southern states' unwillingness to protect the rights of blacks. In the paradigmatic § 1983 case of 1871, the state may have acted, or failed to act, deliberately, but the injury caused by the state would be indirect, and not the result of the state's direct force. Any trespass, or injury resulting from direct force, would have been caused by the Klan. Thus, the Forty-Second Congress would have characterized § 1983 claims as personal injuries similar to action on the case torts and not trespass. The statutes of limitations applicable to

---

14 In states like Alabama which still retain a strict dichotomy between trespass and actions on the case, trespass claims are described in the statute of limitations as false imprisonment or assault and battery, Ala. Code § 6-2-34 (1977), and actions for malicious prosecution, seduction, and libel and slander are separately enumerated along with the general "injury to the person or rights of another" in another section, Ala. Code § 6-2-38 (1977). *See Jones* v. *Preuit & Mauldin*, *supra*.

action on the case, the general personal injury provisions, would have been applied and not those applicable to the specified trespass torts. Indeed, the 42nd Congress specified "action on the case" as the appropriate form of action for the limited but somewhat parallel claims under 42 U.S.C. § 1986.[15] There is no reason to believe that Congress distinguished between § 1983 and § 1986 for these purposes.

Present day statutes of limitations have abandoned the terminology of trespass and action on the case that was still in use in 1871. However, the descendants of the separate provisions for trespass and action on the case are, respectively, the specialized intentional tort provisions and the general personal injury or residual provisions. These general provisions are accordingly the ones that the 42nd Congress would have designated as covering § 1983 actions. Thus, for reasons of history as well as logic the general personal injury statute of limitations should govern § 1983 cases.

---

15 42 U.S.C. § 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and *such damages may be recovered in an action on the case*; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

[Emphasis added].

C. CPLR § 214(5) Is New York's "General Personal Injury" Provision

Petitioners' alternative argument is that the Second Circuit misconstrued New York law. Petitioners contend that CPLR § 214(5) covers most unintentional torts and CPLR § 215(3) covers most intentional torts[16] and therefore both are equally "general." They complain that the court below failed to adhere to the decisional law of New York in characterizing § 214(5) as the general provision.

This Court ordinarily does not disturb "the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976); *Chardon* v. *Fumero Soto*, 462 U.S. 650, 654 n.5 (1983). Petitioners offer no reason to abandon that practice in this case.

Moreover, it is petitioners who disregard the decisional law of New York. In *423 South Salina Street* v. *City of Syracuse*, 68 N.Y. 2d 474, 486, 510 N.Y.S. 2d 507 (1986), the New York State Court of Appeals found that "the three-year period governing actions for damages for personal injuries (CPLR 214[5]), applies [to § 1983 actions] under the *Wilson* rationale." While the New York Court of Appeals was not faced with an argument that CPLR § 215(3) was more analogous to § 1983 claims, it was presumably familiar with all the state statutes of limitations and had no difficulty in identifying the general tort statute of limitations that did apply. Thus, the Second Circuit's decision is consistent with the law of the State of New York as determined by its highest court and should not be disturbed.

---

16 Even petitioners concede that CPLR § 215(3) does not cover all intentional torts. For example, intentional torts of doctors are covered under the medical malpractice provision, CPLR § 214-a, although they were previously covered by the statute of limitations covering assault and batteries. If a doctor performs an operation without a consent it's a battery. *Pearl* v. *Lesnick*, 19 N.Y.2d 590, 278 N.Y.S.2d 237 (1967). Similarly, an operation without informed consent can also be considered a battery. *Cox* v. *Stretton*, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974).

Furthermore, the statute's plain language demonstrates that § 214(5) is the general provision and that § 215(3) is the exception and specialized provision. Section 214(5) applies to "an action to recover damages for a personal injury *except* as provided in section 214-b, 214-c and 215"; these exceptions specifically enumerate the individual torts to which they apply. Section 215(3) is just one of the exceptions to the general provision. As the Second Circuit observed: "By nature, section 214(5) is general; section 215(3) is more specific and exceptional. This dichotomy survives no matter how many similar intentional torts are judically added to those enumerated in section 215(3)." A6.

Section 214(5) is the "general" personal injury provision in fact as well as logic: only a small minority of personal injury cases involve intentional torts such as those enumerated in § 215(3). New York keeps no relevant statistics, but in the District of Columbia, which has a similar statutory scheme,[17] tort cases governed by the more general statute were eight to twelve times more numerous than those governed by the one-year statute for certain intentional torts.[18] Intentional torts are simply not "a major part of the total volume of civil litigation in state courts today," *Wilson*, 471 U.S. at 279, and are not analogous to the "general remedy for injuries to personal rights" that Congress created in passing § 1983. *Id.* at 278.

---

17 Actions for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment" must be brought within one year. Other tort actions are cases "for which a limitations period is not otherwise specifically prescribed" and must be brought within three years. D.C. Code §§ 12-301(4) and (8) (1981).

18 In a three-year period in the federal district court, 2134 personal injury cases were clearly subject to the general statute, while 171 were governed by the shorter statute for enumerated intentional torts. In a six-month period in the Superior Court of the District of Columbia, 659 cases were clearly subject to the general statute, compared to 86 governed by the intentional tort statute. *Hobson* v. *Brennan*, 625 F.Supp. 459, 465 (D.D.C. 1985).

D. CPLR § 215(3) Is Not An Appropriate Statute Of Limitations For § 1983 Actions

Even if the Court viewed New York's intentional tort limitations period as the most factually analogous statute of limitations, it would not be *appropriate* for § 1983 actions and therefore should not be adopted. Appropriateness was defined in *Burnett* v. *Grattan*, 468 U.S. 42, 50 (1984):

> A state law is not "appropriate" if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Act.

The question of appropriateness is related to the more stringent test of whether a state statute is "inconsistent with the Constitution and laws of the United States," 42 U.S.C. § 1988. Indeed, the issues of appropriateness and consistency "shade into each other." *Burnett*, 468 U.S. at 53 n.15.

The question of appropriateness in this case is not the absolute one of whether state law is to be applied or rejected. *Cf. Felder* v. *Casey*, 56 U.S.L.W. at 4691; *Chardon* v. *Fumero Soto*, *supra*; *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980); *Robertson* v. *Wegmann*, 436 U.S. 584 (1978). Rather, the Court must decide which of two state statutes to apply. In this context, the Court's inquiry under *Burnett* must be whether the one-year intentional tort statute favored by petitioners better reflects the practicalities of § 1983 litigation than does the general personal injury statute, and whether the one-year statute's policies are more analogous to the goals of § 1983. The answer to both questions must be "No."

First, as to policy, it is inescapably obvious that the one-year statute is at the low end of New York State limitations periods—drastically shorter than that of for most personal injuries, for professional malpractice, for actions on real property or for most commercial obligations, or for injuries to prop-

erty.[19] It is also much shorter than the periods for state constitutional claims[20] (six years) and state civil rights claims against state defendants (three years).[21] As this Court has recognized, any statute of limitations "represents a balance between . . . [the] substantive interest in vindicating substantive claims, and . . . a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law." *Sun Oil Co.* v. *Wortman*, ____ U.S. ____, 56 U.S.L.W. 4601, 4607 (June 14, 1988) (concurring opinion); *see also*, *Burnett*, 468 U.S. at 52-53. New York has clearly made a judgment that its substantive interest in vindicating certain intentional tort claims is less weighty than its interest in most other legal contro-

19 CPLR §§ 211 (20 years for certain actions on bonds, money judgments, or real property), 212 (ten years for most real property actions and redemption of mortgages), 213 (six years for actions on contract, sealed instrument, bond, note, mortgage, misappropriation of public property, mistake, or fraud; for certain corporate actions; and for actions not otherwise specified), 212-a (four years for residential rent overcharges), 214 (three years for non-payment of money collected upon execution, actions upon statutory liabilities, actions to recover chattels or damages for taking or detaining chattels or injury to property or to annul a marriage for fraud, and for some professional malpractice); 214-a (two and a half years for medical, dental or podiatric malpractice).

The only shorter statute of limitations in New York is that for proceedings pursuant to Article 78 of the CPLR, four months. CPLR § 217. These proceedings "retain their basic nature as the modern procedural device for obtaining relief previously sought by specialized writs of certiorari for review, mandamus, or prohibition"; although constitutional claims may be asserted in these proceedings, there is no suggestion that they are the exclusive state forum for such claims. *Pauk* v. *Board of Trustees of City University of New York*, 654 F.2d 856, 863 (2d Cir. 1981), *cert.denied*, 455 U.S. 1000 (1982).

20 *Pauk* v. *Board of Trustees of City University of New York*, 119 Misc. 2d 663, 464 N.Y.S. 2d 953 (Sup. Ct. 1983), and *see Solnick* v. *Whalen*, 49 N.Y.2d 230, 425 N.Y.S.2d 68 (1980).

21 *Keorner* v. *State of New York*, 62 N.Y. 2d 442, 478 N.Y.S. 2d 584 (1984).

versies,[22] or that the competing interests somehow weigh more heavily in those types of tort cases.

The inappropriateness in § 1983 cases of that kind of judgment has been recognized by the courts. For example, another clause of the same one-year statute favored by petitioners, CPLR § 215(1), governs actions against sheriffs, coroners or constables for official acts or omissions. It was rejected by the Second Circuit as inappropriate for § 1983 actions because its avowed purpose is "to protect the sureties on the sheriff's bond . . ." *Taylor* v. *Mayone*, 626 F.2d 247, 252 (2d Cir. 1980) *quoting Regan* v. *Sullivan*, 557 F.2d 300, 305 n.2 (2d Cir. 1977); *see also Dixon* v. *Seymour*, 62 A.D.2d 444, 405 N.Y.S. 2d 320 (3d Dept. 1978) (describing the history of the statute). Similarly, a one year and ninety day statute for actions against municipalities based on the acts of their officers, agents or employees, General Municipal Law § 50-i, "represents a New York policy to provide more restrictive remedies against municipal employees for their torts than are available against private citizens," and for that reason was found inappropriate for § 1983 actions. *Pauk* v. *Board of Trustees of City University of New York*, 654 F.2d 856, 862 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

By contrast, "the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett*, 568 U.S. at 55.

22 In the 33 states with statutes of limitations that cover designated intentional torts all, but Alabama, have shorter limitations periods for those claims than is provided in the general tort provisions. See, Appendix A. The reason for the exception is that in 1867, Alabama lengthened the time period from one year to six years for its trespass claims to reflect its interest in them. It stated: "It is fit that the people should have full as long a time within which to seek redress by suit for trespass or wrongs to person or to liberty, as they have to seek redress to real or personal property . . ." Ordinance 24, effective December 2, 1867, 1868 Ala. Laws 176.

> To the extent that particular state concerns are inconsistent with, or of marginal relevance to, the policies informing the Civil Rights Acts, the resulting state statute of limitations may be inappropriate for civil rights claims.

Id. at 53 (footnoted omitted). A purpose "to minimize governmental liability" is "manifestly inconsistent with the purpose" of § 1983. *Felder* v. *Casey*, 56 U.S. L.W. at 4692.

Section 215(3) provides a limitations period as restrictive as the disfavored causes of action against sheriffs, municipalities, and their employees, and it is clear that New York has made a judgment about the enumerated intentional torts similar to its judgment about those disfavored actions. While § 215(3) does not in terms or intent discriminate against federal claims, to adopt it as a limitations period for § 1983 would create indirectly exactly the kind of discrimination that a state legislature is forbidden to decree directly. *Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978); and *see Felder*, 56 U.S.L.W. at 4693. Section 215(3) is therefore inappropriate as a statute of limitations for § 1983 actions.

The same conclusion is reached if one examines the practicalities of litigation under § 1983. For the torts set out in § 215(3), there should be little difficulty in bringing suit within one year; as a legislative committee noted in recommending the reduction from two years to one, "the effect of their perpetration is known promptly to the person injured." *Second Preliminary Report of the Advisory Committee on Practice and Procedure*, N.Y. Leg. Doc. 13, at 537-38 (1958). The identity of the perpetrator of an assault, battery, libel, slander, etc., is generally known to the plaintiff at the same time as the tort itself becomes known. There is little difficulty finding lawyers to file such cases since the causes of action have been well known for decades; indeed, the yellow pages are filled with advertisements by tort lawyers offering their services on a contingency basis.

By contrast, constitutional and civil rights violations are not always promptly known to the victim. As this Court noted in *Felder*, for claims "involving the denial of due process or equal protection . . . [a] by no means neglible . . . category of constitutional inquiries, victims will frequently fail to recognize within the 4-month statutory period that they have been wronged at all." 56 U.S.L.W. at 4693 n.3.[23] Deprivations of due process and equal protection were the primary concern of the 1871 Congress.[24]

Even after the recognition that there may be some constitutional wrong, there is often a great deal of factual investigation that must be completed. Under the holdings of this Court, determining the proper parties defendant may be a protracted process. This Court has repeatedly held that the doctrine of *respondeat superior* has no application under § 1983. *City of St. Louis* v. *Prapotnik*, 108 S.Ct. 915, 923 (1988); *Rizzo* v. *Goode*, 423 U.S. 362, 375-76 (1976). Although § 1983 claims may be asserted against supervisory officials and against municipalities, such claims require substantial proof that the supervisor or the municipality "caused" the constitutional violation as that term is understood under § 1983. *St. Louis* v. *Prapotnik*, *supra*; *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 691-92 (1978). Conversely, those governmental actors

---

23 Petitioners argue that the harshness of the short limitations period is ameliorated by the availability of tolling periods. Petitioners' Brief at 28-24. However, they point to none, nor could they, that tolls the statute of limitations until plaintiff has discovered the constitutional dimension of his injury and that he may have a remedy. As petitioners' recognize, a federal claim accrues when a plaintiff knows or reasonably should know of his injury. Petitioners' Brief at 29 n.8. A denial of due process accrues when one is denied property or liberty not when one recognizes that the process was inconsistent with the Constitution. A denial of of equal protection based on race accrues when some benefit or service is denied not when one realizes that others who were not Black were not denied. Tolling statutes do not change those results.

24 The unifying theme of the Civil Rights Act of 1871 is reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every "person" subject to the jurisdiction of any of the several States. The Constitution's command is that all "persons" shall be accorded the full privileges of citizenship; no person shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws.

Wilson, 471 U.S. at 277 (footnote omitted).

with whom the plaintiff has had direct contact may turn out *not* to be the most appropriate defendants. Lower-level staff may be acting pursuant to regulations or instructions promulgated by their superiors or by state or municipal agencies and may therefore be found not to have "caused" the plaintiffs' deprivation[25] or to be entitled to qualified immunity.[26]

It is, of course, possible for a litigant simply to "sue everyone in sight" and leave it for the court to sort out the defendants in the course of motion practice. However, this always dubious practice is contrary to the recently adopted Rule 11, Fed.R.Civ.P., which requires attorneys to certify, based on "knowledge, information, and belief formed after reasonable inquiry," that all papers filed are "well grounded in fact and . . . warranted by existing law or a good faith argument for the extention, modification or reversal of existing law . . ."

Furthermore, the facts that give rise to some constitutional claims may take time and investigation to come to light. Unlike the direct and obvious acts involved in intentional torts, persons who discriminate on the basis of race or deny due process rarely announce it. A black who is denied a job or promotion may not recognize the discrimination until he learns that the person

25 *See*, e.g. *Eakins* v. *Reed*, 710 F.2d 184 (4th Cir. 1983) (named defendants held not liable because they were following their supervisor's orders; judgment against supervisor reversed on procedural grounds); *Wanger* v. *Bonner*, 621 F.2d 675 (5th Cir. 1980) (deputies exonerated in Fourth Amendment case where they served arrest warrants pursuant to Sheriff's instructions; Sheriff could be held liable); *Chancery Clerk of Chickasaw County, Mississippi* v. *Wallace*, 646 F.2d 151, 159-60 (5th Cir. 1981) (executive officials, not judges and clerks, were proper defendants in challenge to civil commitment procedures).

26 *See*, e.g., *Moore* v. *Zarra*, 700 F.2d 329 (6th Cir. 1983) (per curiam) (police officers not liable for unlawful detention based on their good faith reliance on regulations). *Compare Wentz* v. *Klecker*, 721 F.2d 244, 247 (8th Cir. 1983) (official who relied on erroneous legal advice entitled to qualified immunity) *with Smith* v. *Montgomery County, Md.*, 573 F.Supp. 604, 609-10 (D.Md. 1983), *appeal dismissed*, 740 F.2d 963 (4th Cir. 1984) (officials who gave erroneous legal advice could be liable).

hired or promoted was less qualified. See, *Russell* v. *Anchorage*, 743 P.2d 372 (Alaska 1987).

These problems are compounded by the fact that lawyers are not readily available for constitutional and civil rights claims. Congress recognized this problem when it passed the Civil Rights Attorney's Fees Award Act of 1976, amending 42 U.S.C. § 1988 to provide for attorney's fees for prevailing plaintiffs in § 1983 cases. However, the possibility of attorney's fees has not substantially increased the number of attorneys willing to handle constitutional and civil rights cases. Section 1983 litigation is a much greater financial risk for an attorney than ordinary tort litigation—the legal defenses are more plentiful and the burdens of proof are higher. *Kirchoff* v. *Flynn*, 786 F.2d 320, 323-324 (7th Cir. 1986). As a result, there are still many § 1983 *pro se* actions. For example, in a six month period in 1987 of the 313 [27] nonprisoner civil rights actions filed in the Southern District of New York, 252 [28] were *pro se*.

The practicalities of preparing for and filing of constitutional and civil rights litigation under § 1983 are substantially more time consuming than those for intentional tort claims. A statute of limitations set to accommodate intentional tort plaintiffs is clearly inappropriate for § 1983 claims.

Congress's adoption of a one-year statute of limitations for another civil rights statute is not to the contrary of respondent's argument.

Three sections of the Civil Rights Act of 1871 provided for private rights of action. Sections 1 and 2 are now codified as 42 U.S.C. §§ 1983 and 1985. Section 6, the Sherman Amendment, was added to the Act and is now codified as 42 U.S.C. § 1986.

27 Federal Judicial Workload Statistics, Dec. 1987, Admin. Office of U.S. Courts, Stat. Analysis & Reports Div. at 30-31. A total of 626 nonprisoner civil rights actions were filed in 1987; 313 is half that number.

28 Figure provided by the Pro Se Office of the Clerks Office of the United States District Court for Southern District of New York for the period of July 1, 1987 through December 31, 1987.

Section 1986 is the only provision accompanied by its own statute of limitations, which is set at one year.

Ordinary rules of statutory construction, summed up in the commonplace maxim *expressio unius est exclusio alterius*, suggest that if Congress had deemed a one-year limitations period appropriate for § 1983 as well, it would have imposed one. Since it did not, the § 1986 limitations period provides no support whatsoever for the notion that a one-year limitations period is appropriate under § 1983, and indeed suggests the opposite. " 'Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *INS* v. *Cardoza-Fonseca*, 480 U.S. ____, 94 L.Ed.2d 434, 448 (1987) quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Moreover, the legislative history indicates that the addition of the short limitations period to § 1986 represented a legislative compromise necessary to obtain passage of that section of the Civil Rights Act. Section 1986 was one of the most controversial sections of the Act and much of the Congressional debate was directed to it. *Monell*, 436 U.S. at 665. It went through two joint conference revisions before it was acceptable to Congress as a whole. Congressional Globe, 42d Cong. 1st Sess. 663 (1871) ("Globe"), reprinted in *Monell*, 436 U.S. at 665-69. It was in the second revision that a one year statute of limitations was added. Globe 804.[29]

29 The addition of the statute of limitations appears to be in response to statements in the opposition by Senator Thurman. Proponents and opponents of the Sherman Amendment had pointed that similar anti-mob provisions were part of the statutes of several states. Maryland, Sen. Thurman, Globe 771; New York, Sen. Thurman, Globe 771; Kentucky, Sen. Thurman, Globe 773; Massachusetts, Rep. Butler, Globe 792. Senator Thurman noted that the New York statute had a specified short statute of limitation, three months, and stated that § 1986 should have one. Globe 771. Although not noted in the debates, Maryland also had a prescribed statute of limitation, but a long one, three years, Act of March 22, 1867, Supp. to Md. Code 1868, Act 82, p.289. Globe 771. The other state statutes did not have specified limitation periods. Ky. Gen. Stat. Ch. 1, § 5 (1873); Mass. Gen. Stat. Ch. 164, § 8 (1859).

This compromise revision like the others limited the scope of the Sherman Amendment. Without the one year statute of limitation, the forum state's action on the case statute of limitations would have applied to § 1986 under the Federal Judiciary Act of 1789[30] and the periods of limitation would generally have been much longer.[31] Indeed, as a result of the addition of one year statute of limitations and the other changes affecting who could be sued, both Senator Sherman and the leading opponent of his amendment, Senator Thurman, believed that § 1986 was so restrictive that it no longer was "worth the paper it was written on." Globe 822.

In contrast to the Sherman Amendment, § 1983 was not subject to lengthy debate or restrictive amendment. *Monell*, 436 U.S. at 665. Nothing could be more inappropriate to § 1983 and inconsistent with its legislative history than to graft onto it a restrictive state one year statute of limitations.

In sum, the policies underlying § 1983, the practicalities of § 1983 litigation, and the history of the 1871 Civil Rights Act all support the view that New York's short statute for certain intentional torts is not an appropriate statute of limitations for actions under § 1983.

30 Section 34 of this Act provided:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

(1 Stat. at L.73,92). See, *Campbell* v. *City of Haverhill*, 155 U.S. 610, 614 (1895).

31 See Appendix B. The periods of limitation for personal injury claims were: 10 years: Louisiana; 6 years: Colorado, Connecticut, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, Wisconsin,; 5 years: Florida, Kentucky, Missouri, Virginia, West Virginia, Territory of Montana; 4 years: Ohio, Territories of Arizona, Idaho, Nebraska, Wyoming; 3 years: Arkansas, Delaware, District of Columbia, North Carolina, Territory of Washington; 2 years: California, Georgia, Illinois, Indiana, Iowa, Kansas, Oregon, Territory of Nevada; 1 year; Alabama, Maryland, Tennessee, Texas.

Claims for property damage would generally have been longer.

POINT II

ANY DECISION OVERRULING CLEAR SECOND CIRCUIT PRECEDENT SHOULD BE APPLIED PROSPECTIVELY ONLY

Any decision by this Court that the one year statute of limitations under CPLR § 215(3) should be adopted for § 1983 claims would be an unforeseeable break with long standing Second Circuit precedent. *Pauk* v. *Board of Trustees of City University of New York*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). Such a decision should be given prospective effect only.

In *Pauk*, the Second Circuit reaffirmed earlier precedents and held that New York's three year statute of limitations for causes of action based on statutes, CPLR § 214(2), applied to § 1983 actions. *Id.* at 866. In addition, it held that:

> A federal court, searching for an analogous state limitations period for a § 1983 suit, should not select any period shorter than the two years Congress has specified as the time within which notice must be given of claim against the United States for unlawful actions by federal law enforcement officers. 28 U.S.C. §§ 1346(b), 2680(h) (1976). That expression of federal policy should establish a floor for the limitations period of § 1983 suits, so many of which concern similar conduct by state law enforcement officers.

Id. at 862.

These holdings remained clear and unquestioned at the time respondent's claim arose in January 1984. JA5. In April 1985, this Court decided *Wilson*, effectively overruling the holding in *Pauk* that CPLR § 214(2) applied in § 1983 cases. However, *Wilson* did not overrule the *Pauk* holding that no statute with less than a two year limitations period would be adopted. In November 1985, less than two years after his claim accrued, respondent filed his complaint. JA3. Respondent reasonably relied on *Pauk* at the time his action accrued and neither this

Court's decision in *Wilson* nor a decision here adopting a one year statute of limitations should be retroactively applied.

This Court has established three factors to be considered in determining whether new precedents should be retroactively applied:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling a clear past precedent on which litigants may have relied, see, e.g., *Hanover Shoe* v. *United Shoe Machinery Corp.*, *supra*, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen* v. *State Board of Elections*, *supra*, at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, *supra*, at 629. Finally, we have weighted the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." *Cipriano* v. *City of Houma*, *supra*, at 706.

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106-107 (1971).

The Court in *Chevron Oil* refused to apply retroactively a new precedent, which established that state personal injury statutes of limitations applied to tort actions occurring on oil rigs in navigable waters and not federal admiralty law, *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). The Court found that the *Rodrigue* decision was one of first impression for the Court and a clear break in precedent from Fifth Circuit decisions. In regard to the second factor for consideration, the Court found that the reason state law was to be adopted by federal courts was to aid injured employees; yet retroactive application of the statute of limitations would have just the opposite

affect. Lastly, the Court found that it would be inequitable to hold that the plaintiff " 'slept on his rights' when he could not have known the time limitation that the law imposed upon him." *Chevron Oil*, 404 U.S. at 108-109.

Similar considerations are present in this case as well. First, *Wilson* was a break from the past and to the extent that it overrules clear precedent it should not be applied retroactively. *Saint Francis College* v. *Al-Khazraji*, ____ U.S. ____, 107 S.Ct. 2022 (1987). Respondent must be given a reasonable time to file after the *Wilson* decision. *Anton* v. *Lehpamer*, 787 F.2d 1141, 1145-1146 (7th Cir. 1986); *Bailey* v. *State of Illinois*, 622 F.Supp. 504, 509-510 (N.D. Ill. 1985); *Shorters* v. *City of Chicago*, 617 F.Supp. 661, 667-668 (N.D. Ill. 1985). Respondent filed his Complaint seven months after the *Wilson* decision. It has long been the practice in both the federal courts and the New York State courts that, when there is a legislative change that shortens a statute of limitations, a reasonable time must be provided to allow the filing of claims that were previously timely but are now time barred. *Terry* v. *Anderson*, 95 U.S. 628, 632-633 (1877); *Parmenter* v. *State*, 135 N.Y. 154, 31 N.E. 1035 (1892). The same principle should apply when there are changes brought about by the courts. *See*, *Bailey* v. *State of Illinois*, *supra*.

Moreover, *Wilson* did not affect respondent's reliance on the holding in *Pauk* that no state statute of limitations could be adopted with less than a two year limitation period. *Pauk*, 654 F.2d at 862. That precedent has remained undisturbed since 1981. This Court has rejected limitations periods of four months and six months in *Felder* and *Burnett*, respectively, but has not ruled on statutes of other lengths. At the same time, there have been no Second Circuit cases that have questioned the holding *Pauk*. Thus, a decision in petitioners' favor here would "overrule a clear past precedent on which [respondent] relied." *Chevron*, 404 U.S. at 106..

Secondly, prospective application of *Wilson* or of a decision in this case adopting a one year statute of limitations would enhance rather than retard the operation of *Wilson*. As this Court

found in *Chevron*, the reason why any state statute of limitations is adopted is to aid injured parties by providing comprehensive and familiar remedies. *Chevron*, 404 U.S. at 107-108. Yet, retroactive application of a one year statute of limitations would deprive "respondent of any remedy." *Id.* at 108. Prospective application of this one year provision, on the other hand, will not retard its operation.

Finally, the retroactive application of a new and shorter statute of limitations would work a grave injustice on this respondent and others similarly situated. In reliance on *Pauk*, respondent has already incurred considerable expenses even before the litigation of his claim on the merits. The cost of counsel in investigating his claim, filing this lawsuit, and now defending against dismissal are significant. To dismiss this claim without reaching the merits would be inequitable. By contrast, petitioners would in no way be prejudiced by only a prospective application. They have had adequate notice and could not have relied on a one year statute of limitations.

Thus, based on the three factors set out in *Chevron Oil*, § 1983 claims that accrued prior to the decision in this case, and which were timely filed consistent with *Pauk* and within a reasonable time after *Wilson* was decided should be allowed to proceed.

CONLUSION

For the reasons stated above, the decision below should be affirmed.

Respectfully submitted,

KENNETH KIMERLING
Counsel of Record
Puerto Rican Legal Defense
and Education Fund, Inc.
99 Hudson Street—14th Fl.
New York, New York 10013
(212) 219-3360

JOHN A. POWELL
STEVEN SHAPIRO
HELEN HERSHKOFF
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

ARTHUR N. EISENBERG
New York Civil Liberties Union
132 W. 43 Street
New York, New York 10036
(212) 382-0557

JOSEPH M. BRENNAN
Sullivan, Rehfuss,
Cunningham & Brennan
152 Central Avenue
Albany, New York 12206
(518) 434-3125

Counsel For Respondent

On the brief:

Juan Beritan
Brooklyn Law School
Tanya Hernandez
Yale Law School
Thomas Kelly
CUNY Law School
Jean Wagner-Rosenblatt
University of Texas
Law School

Dated: July 15, 1988

APPENDIX A

APPENDIX A

PERSONAL INJURY STATUTES OF LIMITATIONS IN STATES WITH SPECIFIED INTENTIONAL TORT PROVISIONS

Alabama

Ala. Code § 6-2-38(h)(i)(k)(1) (Supp. 1987) (two years for "any injury to the person or rights of another not arising from contract and not specifically enumerated," "libel or slander," "seduction", and "malicious prosection")

Ala. Code § 6-2-34(1) (1977) (six years "for any trespass to person or liberty, such as false imprisonment or assault and battery")

Arizona

Ariz. Rev. Stat. Ann. § 12-542 (Supp. 1987) (two years for "injuries done to the person of another")

Ariz. Rev. Stat. § 12-541 (1956) (one year for malicious prosecution, false imprisonment, libel, slander, seduction, and breach of promise of marriage)

Arkansas

Ark. Code § 16-56-105 (1987) (three years for "liability not under seal and not in writing" and libel)

Ark. Code § 16-56-104 (1987) (one year for assault and battery, slander, false imprisonment, "criminal conversation")

Colorado

Colo. Rev. Stat. § 13-80-102(a) (Bradford 1987) (two years for "tort actions, but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outra-

geous conduct, interference with relationships, and tortious breach of contract")

Colo. Rev. Stat. § 13-80-103 (Bradford 1987) (one year for assault and battery, false imprisonment, false arrest, libel and slander)

District of Columbia

D.C. Code An. § 12-301(8) (1981) (three years for actions not otherwise prescribed)

D.C. Code Ann. § 12-301(4) (1981) (one year for assault, battery, libel, slander, malicious prosecution, false arrest, false imprisonment, mayhem, wounding)

Florida

Fla. Stat. Ann. § 95.11(3)(a) and (o) (West 1982 & Supp. 1988) (four years for "action founded on negligence" and assault, battery, false imprisonment, malicious prosecution, false arrest, and for "any other intentional tort except as provided in subsections (4) and (5)")

Fla. Stat. Ann. § 95.11(4)(g) (West 1982) (two years for libel and slander)

Georgia

Ga. Code Ann. § 9-3-33 (1982) (two years for injury to the person)

Ga. Code Ann. § 9-3-33 (1982) (one year for injury to the reputation)

Ga. Ann. Code § 9-3-33 (1982) (four years for "injury to the person involving a loss of consortium")

Illinois

Ill. Code of Civ. Proc. § 13-202 (1983) (two years for "injury to the person" including false imprisonment, malicious prosecution, seduction, criminal conversation, and abduction)

Ill. Code of Civ. Proc. § 13-201 (1983) (one year for libel and slander);

Kansas

Kan. Stat. Ann. § 60-513 (1983) (two years for "injury to rights of another")

Kan. Stat. Ann. § 60-514 (1983) (one year for libel, slander, assault, battery, malicious prosecution, false imprisonment)

Maine

Me. Rev. Stat. Ann. tit. 14 § 752 (1980) (six years for all civil actions except as specifically otherwise provided)

Me. Rev. Stat. Ann. tit. 14 § 7552-c (Supp. 1987) (six years for action based on sexual act with a minor)

Me. Rev. Stat. Ann. tit. 14 § 753 (Supp. 1987) (two years for assault, battery, false imprisonment, libel and slander)

Maryland

Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1984) (three years for all civil actions)

Md. Cts & Jud. Proc. Code Ann. Stat. § 5-105 (1984) (one year for assault, battery, slander or libel)

Michigan

Mich. Stat. Ann. § 27A.5805(9) (Callaghan Supp. 1988) (three years for "injury to person")

Mich. Stat. Ann. § 27A.5805(2)(3) (Callaghan Supp. 1988) (two years for assault, battery, false imprisonment, malicious prosecution)

Mich. Stat. Ann. § 27A.5805(7) (Callaghan Supp. 1988) (one year for libel and slander)

Mississippi

Miss. Code Ann. § 15-1-49 (1972) (six years for all action for which no other period is prescribed)

Miss. Code Ann. § 15-1-35 (Supp. 1987) (assault, battery, maiming, false imprisonment, "menance [sic.]", libel and slander)

Missouri

Mo. Ann. Stat. § 516.120(4) (Vernon 1952) (five years "injury to the person")

Mo. Ann. Stat. § 516.140 (Vernon Supp. 1988) (two years for libel, slander, assault, battery, false imprisonment, criminal conversation, and malicious prosecution)

Montana

Mont. Code Ann. § 27-2-204(1) (1987) (three years for "tort liability not founded upon an instrument in writing")

Mont. Code Ann. § 27-2-204(3) (1987) (two years for libel, slander, assault, battery, false imprisonment, and seduction)

Nebraska

Neb. Rev. Stat. § 25-2-207 (1943 & Supp. 1985) (four years for "injury to rights of plaintiff")

Neb. Rev. Stat. § 25-2-208 (1943 & Supp. 1985) (one year for libel, slander, assault, battery, false imprisonment, malicious prosecution)

New York

CPLR § 214(5) (three years for "an action to recover damages for a personal injury except as provided in 214-b, 214-c and 215")

CPLR § 215(3) (one year for "an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy")

New Jersey

N.J. Stat. Ann. tit. 2A § 14-2 (West 1987) (two years for "injury to person")

N.J. Stat. Ann. tit. 2A § 14-3 (West 1987) (one year for libel and slander)

North Carolina

N.C. Gen. Stat. § 1-52 (1983) (three years for "criminal conversation" and "injury to person or rights")

N.C. Gen. Stat. § 1-54(3) (1983) (one year for libel, slander, assault, battery, false imprisonment)

North Dakota

N.D. Cent. Code § 28-01-16 (1974) (six years for "injury to person or rights not in contract or expressly provided for" including "criminal conversation")

N.D. Cent. Code § 28-01-18 (1974) (two years for libel, slander, assault, battery, false imprisonment)

Ohio

Ohio Rev. Code Ann. § 2305.10 (Page Supp. 1987) (two years for "bodily injury")

Ohio Rev. Code Ann. § 2305.11 (Page Supp. 1987) (one year for assault and battery)

Ohio Rev. Code Ann. § 2305.111 (Page Supp. 1987) (one year for libel, slander, malicious prosecution, false imprisonment)

Oklahoma

Okla. Stat. Ann. tit. 12 § 94(3) (West Supp. 1988) (two years for "injury to rights of another")

Okla. Stat. Ann. tit. 12, § 94(4) (West Supp. 1988) (one year for libel, slander, assault, battery, malicious prosecution, false imprisonment)

Pennsylvania

42 Pa. Cons. Stat. Ann. § 5524(1)(2) (Purdon 1981) (two years for assault, battery, false imprisonment, false arrest, malicious prosecution, malicious abuse of process and "injuries to the person")

42 Pa. Cons. Stat. Ann § 5523(1) (Purdon 1981) (one year for libel, slander)

Rhode Island

R.I. Gen. Laws § 9-1-14(b) (1985) (three years for "injury to person")

R.I. Gen. Laws § 91-1-14(a) (1985) (one year for "actions for words spoken")

South Carolina

S.C. Code Ann. § 15-3-530(5) (Law Co-Op. 1976 & Supp. 1987) (six years for "criminal conversation" and "injury to person or rights")

S.C. Code Ann. § 15-3-550 (two years for libel, slander, assault, battery, false imprisonment)

South Dakota

S.D. Codified Laws Ann. § 15-2-13 (1984) (six years for "injury to rights of another" and "criminal conversation")

S.D. Codified Laws Ann. § 15-2-15 (1984) (two years for libel, slander, assault, battery, false imprisonment)

Tennessee

Tenn. Code Ann. § 28-3-104 (1980) (one year injury to the person, false imprisonment, malicious prosecution, criminal coversation, libel, seduction)

Tenn. Code Ann. § 28-3-103 (1980) (six months for slander)

Texas

Tex. Civ. Code Ann. § 16.003 (Vernon 1986) (two years for "personal injury")

Tex. Civ. Code Ann. § 16.002 (Vernon 1986) (one year for malicious prosecution, libel, slander, "breach of promise of marriage")

Utah

Utah Code Ann. § 78-12-25 (Michie 1987) (four years for actions not otherwise provided for)

Utah Code Ann. § 78-12-29 (Michie 1987) (one year for libel, slander, assault, battery, false imprisonment, seduction)

Virginia

Va. Code § 8.01-243A (Supp. 1987) (two years for personal injuries)

Va. Code § 8.01-248 (1984) (one year for malicious prosecution or abuse of process)

Washington

Wash. Rev. Code Ann. § 4.16.080 (1962) (three years for injury to person)

Wash. Rev. Code Ann. § 4.16.100 (1962) (two years for libel, slander, assault, battery, false imprisonment)

Wisconsin

Wisc. Stat. Ann. § 893.54 (West 1983) (three years for injuries to person)

Wisc. Stat. Ann. § 893.57 (West 1983) (two years for libel, slander, assault, battery, false imprisonment, "or other intentional tort")

Wyoming

Wyo. Stat. Ann. § 1-3-105(iv)(C) (1977) (four years for "injury to rights of plaintiff")

Wyo. Stat. § 1-3-105 (iv)(D) (one year for libel, slander, assault, battery, malicious prosecution, false imprisonment)

APPENDIX B

APPENDIX B

STATE AND TERRITORY STATUTES OF LIMITATIONS FOR PERSONAL INJURY IN EFFECT IN 1871

Alabama

Ala. Code § 3231 (1877) ("malicious prosecution," "criminal conversation," "seduction of a female," "breach of marriage promise," "libel or slander," and "civil actions, for any injury to the person, or rights of another" one year)

Ala. Code § 3326 ("action for any trespass to person or liberty such as false imprisonment, or assault and battery," six years)

Arkansas

Ark. Rev. Stat. § 4120 (1874) (general personal injury three years)

Ark. Rev. Stat., § 4121 (1874) ("criminal conversation," "assault and battery," "false imprisonment," "actions on words spoken, slandering the character of another," and for "words spoken, whereby special damages are sustained" one year)

California

Cal. Gen. Laws, Ch. 3, § 4359 (T.H. Hittell 1872), (general personal injury two years)

Cal. Gen. Laws, ch. 3, § 4359 (1872) ("action for libel, slander, assault, battery, or false imprisonment" one year)

Colorado

Colo. Rev. Stat., Ch. 55, § 1 (1868) ("actions on the case" six years)

Colo. Rev. Stat., Ch. 5, § 2 (1868) ("actions for assault and battery," "false imprisonment," "slanderous words" and for "libels" one year)

Connecticut

Conn. Gen. Stat. tit. 39, § 4 (1866) ("action of trespass on the case" six years)

Conn. Gen. Stat., tit. 39, § 5 (1866), ("action of trespass" and "action upon the case in words" three years)

Delaware

Del. Rev. Stat., Ch. 123, § 6 (1874) ("action of trespass" and "action upon the case" three years)

District of Columbia

1715 Md. Laws, Ch. 23, § 2 ("actions upon the case" three years)

1715 Md. Laws, Ch. 23, § 2 ("actions on the case for words and actions of trespass of assault, battery, wounding, and imprisonment" one year) Reprinted in Laws of District of Columbia (W.H. & O.H. Morrison, 1863)

Florida

Act Concerning Limitation of Actions, Nov. 4, 1828, § 4, 1829 Terr. Fla. Laws 105 ("actions upon the case" five years)

1829 Terr. Fla. Laws 105 ("actions of trespas [sic.], assault, battery, wounding, imprisonment" three years)

1829 Terr. Fla. Laws 105 ("actions upon the case for words" one year)

Georgia

Ga. Code § 3005 (Franklin Steam Printing House 1867), (general personal injury two years)

Ga. Code § 3005 (1867) ("injuries to the reputation" one year)

Illinois

Act of Feb. 21, 1861, 1861 Ill. Laws 142; (personal injury including "actions of trespass for assault, battery, wounding and imprisonment" two years)

1861 Ill. Law 142 ("action on the case, for slander or libel" one year)

Indiana

Ind. Stat., Ch. 1, Art. 12 (Edwin A. Davis 1852) (general personal injury two years)

Iowa

Iowa Code, tit. 19, Ch. 99 (1851) (general personal injury two years)

Kansas

Kan. Gen. Stat. Ch. 80, § 18 (1868) (general personal injury two years)

Kan. Gen. Stat., Ch. 80, § 18 (1868) ("action for libel, slander, assault, battery, malicious prosecution, or false imprisonment" one year)

Kentucky

Ky. Gen. Stat., Ch. 71, § 2 (J.F. Bullitt and John Feland 1879) (general personal injury five years)

Ky. Gen. Stat., Ch. 71, § 3 (J.F. Bullitt and John Feland 1879) ("malicious prosecution, conspiracy, arrest, seduction, criminal conversation, or breach of promise of marriage," "libel or slander" one year)

Louisiana

La. Rev. Civ. Code § IV Art. 3544 (1870) (general personal injury ten years)

Maine

Me. Rev. Stat., tit. 9 § 79 (1871) ("actions on the case" six years)

Me. Rev. Stat. tit. 9 § 81 (1871) ("action of assault and battery, false imprisonment, for slanderous words," and "libels" two years)

Maryland

Md. Code, art. 57, § 1 (1860) (general personal injury one year)

Massachusetts

Mass. Gen. Stat., Ch. 155, § 1 (1859) (general personal injury six years)

Mass. Gen. Stat. Ch. 155, § 2 (1859) ("actions for assault and battery," "false imprisonment," "for slanderous words," "libel" two years)

Michigan

Mich. Comp. Laws, Vol. II, Ch. 229 (1872) ("actions on the case" six years)

Mich. Comp. Laws, Vol. II, Ch. 229 (1872) ("actions on slanderous words," "libels," "assault and battery," "false imprisonment" two years)

Minnesota

Minn. Stat., Vol. II, tit. II, § 6 (1873) (general personal injury six years)

Minn. Stat., Vol. II, § 8 (1873) ("action for libel, slander, assault, battery or false imprisonment" two years)

Mississippi

Miss. Rev. Code, § 2151 (1871) ("actions for the case" six years)

Miss. Rev. Code, § 2152 (1871) ("actions for assault, battery, maiming, false imprisonment, malicious arrest, menace," "for slanderous words" and "libels" one year)

Missouri

Mo. Gen. Stat., Ch. 191 § 10 (1866) (general personal injury five years)

Mo. Gen. Stat., Ch. 191, § 12 (1866) ("action for libel, slander, assault, battery, false imprisonment, or criminal conversation" two years)

New Hampshire

N.H. Gen. Stat., Ch. 202 § 3 (B.W. Sanborn & Co., 1867) (general personal injury six years)

N.H. Gen. Stat., Ch. 202 § 3 (B.W. Sanborn & Co., 1867) ("actions of trespass to the person and actions for defamatory words" two years)

New Jersey

N.J. Stat. Limitations of Actions § 8 (1896) ("upon the case" six years)

N.J. Stat. Limitations of Actions § 9 (1896) ("actions of trespass for assault, menace, battery, wounding, and imprisonment" four years)

N.J. Stat., Limitation of Actions § 10 (1896) ("action upon the case for words" two years)

New York

1848 N.Y. Laws 47, § 71 ("action for criminal conversation," "injury to the person" six years)
1848 N.Y. Laws 47, § 73 ("action for libel, slander, assault, battery or false imprisonment" two years)

North Carolina

N.C. Civ. Pro. Code, tit. 4, Ch. 3, § 34 (1868) (general personal injury three years)
N.C. Civ. Pro. Code, tit. 4, Ch. 3, § 35 (1868) ("an action for libel, assault, battery, or false imprisonment" one year)
N.C. Civ. Pro. Code, tit. 4, Ch. 3, § 36 (1868) ("action for slander" six months)

Ohio

Ohio Rev. Stat. § 72 (Robert Clark & Co. Supp. 1868) (general personal injury four years)

Oregon

Act of Oct. 20, 1870, ch. 1, 1874 Or. Laws 107 (general personal injury, two years)

Pennsylvania

Act of Mar. 27, 1713, 1 Sm. L. § 1 reprinted in Digest of Pennsylvania Laws (T. & J.W. Johnson & Co. 1896) at 2666-2667 ("actions upon the case" six years)
Act of Mar. 27, 1713, ("actions of trespass of assault, menace, battery, wounding, imprisonment" two years)

Act of April 25, 1850, P.L. 569 § 35 reprinted in Digest of Pennsylvania Laws (T. & J.W. Johnson & Co. 1896) at 2670 (libel and slander one year)

Rhode Island

R.I. Rev. Stat., Ch. 177, § 3 (1857) ("all actions on the case" six years)
R.I. Rev. Stat. Ch. 177 § 2 (1857) ("actions of trespass" four years)
R.I. Rev. Stat., Ch. 177, § 1 (1857) ("actions upon the case for words two years)

South Carolina

Act of 1870, Ch. 3 § 114 1870 S.C. Acts 447 (general personal injuries six years)
Act of 1870, Ch. 3 § 116 1870 S.C. Acts 448 ("action for libel, slander, assault, battery, or false imprisonment" two years)

Tennessee

Tenn. Code § 2772 (1858) ("for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, and breach of marriage promise," one year)
Tenn. Code § 2771 (1858) ("slanderous words spoken" six months)

Texas

Act of Feb. 5, 1841, 1841 Tex. Laws 163 (general personal injury one year)

Vermont

Vt. Gen. Stat., tit. 18, Ch. 63 § 5 (1863) ("actions on the case" six years)
Vt. Gen. Stat., tit. 18, Ch. 63 § 7 ("action for assault and battery, and for false imprisonment" three years)
Vt. Gen. Stat., tit. 18, Ch. 63 § 8 ("actions for slanderous words, and for libels" two years)

Virginia

Va. Code, tit. 45, Ch. 149 § 11 (1860) reprinted Negro Universities Press (1970) (general personal injury five years)

West Virginia

W. Va. Code, Ch. 104, § 12 (1870) (general personal injury five years)

Wisconsin

Wis. Rev. Stat., Ch. 138, § 17 (St. Louis, W.J. Gilbert 1871), (general personal injury six years)
Wis. Rev. Stat., Ch. 138, § 19 (1871) ("action for libel, slander, assault, battery, or false imprisonment" two years)

TERRITORIES

Arizona

Ariz. Comp. Laws, Ch. 35, § 14 (Albany N.Y. Weed, Parsons & Co. 1871) (general personal injury two years)
Ariz. Comp. Laws, Ch. 35, § 14 (1871) ("action for libel, slander, assault, battery or false imprisonment" one year)

Idaho

Act of Jan. 23, 1864, 1864 Idaho Laws 553 (general personal injury two years)

Montana

Act to Amend § 8 of Act of Feb. 9, 1865, 1870 Mont. Laws 62 (general personal injury five years)
1870 Mont. Laws 62 ("action for libel, slander, assault, battery, or false imprisonment" two years)

Nebraska

Civil Code tit. 2, Ch. 1 § 14 1859 Neb. Laws 111 (general personal injury four years)
Civil Code tit. 2, Ch. 1 § 15 1859 Neb. Laws 111 ("action for libel, slander, assault, battery, malicious prosecution, or false imprisonment" one year)

Nevada

Act of Nov. 21, 1861, 1862 Nev. Stat. 29 (general personal injury two years)

Washington

An Act Regulating the Time Within Which Civil Actions May Be Commenced, 1858 Wash. Laws 362 (general personal injury three years)
1858 Wash. Laws 362 ("action for libel, slander, assault, assault and battery, and false imprisonment" one year)

Wyoming

Wyo. Comp. Stat. Ch. 13, tit. 2 § 12 (1876) (general personal injury four years)

Wyo. Comp. Stat., Ch. 13, tit. 2, § 13 (1876) ("action for libel, slander, assault and battery (1876) malicious prosecution, or false imprisonment" one year)

Respondent has not been able to locate the statute of limitations in effect in 1871 for the Territory of New Mexico.

REPLY

BRIEF

No. 87-56

IN THE

Supreme Court of the United States

October Term, 1987

JAVAN OWENS and DANIEL G. LESSARD,
Petitioners,

against

TOM U. U. OKURE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Leave to File Reply Brief Out of Time and Reply Brief for Petitioners

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners
The Capitol
Albany, NY 12224
(518) 474-8101

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

CHARLES R. FRASER
ALAN W. RUBENSTEIN
Assistant Attorneys General
of Counsel

Dated: September 28, 1988

No. 87-56

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAVAN OWENS and DANIEL G. LESSARD,

Petitioners,

against

TOM U. U. OKURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Leave to File Reply Brief Out of Time

Petitioners respectfully move for leave to file the attached reply brief out of time. Oral argument in this case is scheduled for November 1, 1988 so that the Court and respondent have ample time to study the proposed reply brief prior to argument.

Regrettably we failed to take into account the Court's new rule on reply briefs until after the time for filing thereunder had expired. Nevertheless, we believe that the proposed reply brief will aid the Court in consideration of this matter and request that it be accepted.

Dated: Albany, New York
September 28, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
The Capitol
Albany, New York 12224
(518) 474-8101

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

No. 87-56

IN THE

Supreme Court of the United States

October Term, 1987

JAVAN OWENS and DANIEL G. LESSARD,
Petitioners,

against

TOM U. U. OKURE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners
The Capitol
Albany, NY 12224
(518) 474-8101

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

CHARLES R. FRASER
ALAN W. RUBENSTEIN
Assistant Attorneys General

of Counsel

Dated: September 28, 1988

Table of Contents.

TABLE OF AUTHORITIES

CASES:

No. 87-56

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAVAN OWENS and DANIEL G. LESSARD,

Petitioners,

against

TOM U. U. OKURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

I.

Under the principles of *Wilson v. Garcia*, in a state having several statutes of limitation applying to personal injury claims, the most appropriate one for borrowing purposes of 42 U.S.C. § 1988 is that relating generally to intentional torts.

In reaching its conclusion in *Wilson v. Garcia*, 471 U.S. 261 (1985), that the statute of limitations to be borrowed for 42 U.S.C. § 1983 claims should be one for personal injury actions, the Court emphasized that the "specific historical catalyst" for the Civil Rights Act of 1871 was atrocities being committed by the Ku Klux Klan. 471 U.S. at 276-277. It is our position, as discussed in our opening brief, that for states such as New York that have several personal injury statutes of limitations, unlike the single one involved in *Wilson*, the teachings of *Wilson* call for borrowing the state's limitations statute relating generally to intentional torts.

A major premise of respondent's opposing argument that New York's residual personal injury statute of limitations should be used is his suggestion (Br, p 14) that § 1983 would not have reached suits against Klansmen who perpetrated the acts of atrocity but only suits against the officials who had failed to deal with the reign of terror perpetrated by the Klan. Based on that premise, respondent then argues that § 1983 was not intended to deal directly with the various types of mayhem being committed by the Klan. Neither the history of section 1 of the Ku Klux Klan Act of 1871, 17 Stat. 13, from which § 1983 was derived, nor this Court's decisions support that narrow reading of § 1983.

To be sure, as this Court has now made plain, suits under § 1983 must include some action "under color of"

law, custom or usage. But the defendant need not be an officer of the state. "It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966)." *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). Moreover, the fact that the state actor may be immune from civil liability does not change the applicability of § 1983 to the private defendants involved. 449 U.S. at 28-29. Indeed, such state involvement might result from the police intentionally tolerating violence or threats of violence directed at those seeking to violate laws or practices imposing restrictions on account of race. *See Adickes*, 398 U.S. at 172.

Thus, the decisions of this Court show that although § 1983 would not apply to solely independent actions of Klansmen, it would have applied to Klan actions involving some participation by government actors, perhaps in the form of deliberate inaction. As the Court has noted, *Adickes*, 398 U.S. at 167-168:

> "As Representative Garfield said: '[E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.' Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law. [Footnote omitted.]"

While only a relatively small portion of the extended debates on the Ku Klux Klan Act related specifically to

section 1, *see, e.g., Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 665 (1978), the debates generally showed that the primary overall purpose of the Act was to counter the atrocities perpetrated by the Klan. Moreover, the debates showed that many of the Republican supporters of the legislation viewed the Klan as designed to aid the Democratic party, in part by deterring blacks from voting as well as coercing white supporters of the Republic party. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 320-321, 390-391, 394, 413, 426, 443-444, 457-460, 654, App. 78, 107, 270; *see also*, Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 Northwestern Univ. L. Rev. 277, 279-281 (1965). While much of the South was still under Republican control in 1871, Klansmen or their supporters had some governmental power. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 653; *see also*, Randall and Donald, *The Civil War and Reconstruction*, 684-685 (2d ed. 1961). Moreover by 1871, the year when the Klan Act was enacted, Congress was taking steps to restore full political rights to ex-Confederates. *See* Kluger, *Simple Justice*, p. 59 (1976). Thus, to the extent that law enforcement officials were unwilling to enforce state laws against the Klan (or were themselves actively involved), when it was acting to deprive citizens of their constitutional rights, *see Monroe v. Pape*, 365 U.S. 167, 175-176 (1961), there is every reason to believe that Congress would have viewed that as the type of joint activity that would make the actions of the Klansmen, as well as those of the governmental officials, state action.

To be sure, since such joint activity would not necessarily be present or provable and since the civil remedies of section 1 of the Ku Klux Klan Act might well prove a small tool against the Klan, the other more sweeping provisions of that Act were necessary and engendered most of the debate before Congress. Nevertheless, it seems

plain to us that this Court's reliance in *Wilson v. Garcia* on the fact that Klan atrocities were the principal catalyst for the 1871 Ku Klux Klan Act and that the atrocities sounded in tort was in no sense inadvertent as respondent's argument necessarily suggests.

Moreover, even in actions solely against law enforcement officers for failure to enforce laws equally, the violent acts of Klansmen would have been key facts to be proven. Thus, the limitations period chosen under state laws for comparable acts of violence, such as assault or battery, are the most appropriate guidelines where such acts are so critical for proving the federal § 1983 tort.[1]

II.

The ruling on the statute of limitations here should be applied to the present case.

Respondent, relying upon *Pauk v. Board of Trustees of City University of New York*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), urges that any decision applying the one-year statute of limitations of New York CPLR § 215(3) for section 1983 claims "would be an unforeseeable break with long standing Second Circuit precedent." Thus, respondent argues for nonretroactivity in the present case (Respt Br, p. 30).

While the decision in *Wilson v. Garcia* decided that a single statute of limitations should apply to all § 1983 actions within a state and that a personal injury statute

[1]While the history of the Ku Klux Klan Act shows that prosecutors, judges and sheriffs may all have been derelict in not enforcing laws against Klansmen, immunities preserved by the Act would have precluded § 1983 damage actions solely against such officials, except perhaps against sheriffs, for not fulfilling their responsibilities. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 334-335 (1983).

should be chosen, it left open which statute should apply where a state had more than one statute of limitations applying generally to personal injuries. Thus, this case does not involve the issue involved in *Chevron* as to whether an earlier decision of this Court should not be applied retroactively. Instead, the question is whether the Court should adhere to its policy of applying the rule it announces to the parties before it. *See Stovall v. Denno*, 388 U.S. 293, 301 (1967). As the Court there observed:

> "Sound policies of decison-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies • • • militate against denying Wade and Gilbert the benefits of today's decision. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making [footnote omitted]."

See also, Goodman v. Lukens Steel Co., __ U.S. ___, 96 L.Ed 2d 572, 600, 107 S.Ct. 2617, 2636 (1987) (O'Connor, J., concurring). The determination we seek that the one-year statute of limitations is applicable in this case would be no more than dictum here unless it results in dismissal of the action.

Goodman and *Saint Francis College v. Al-Khazraji*, ___ U.S. ___, 95 L.Ed.2d 582, 107 S.Ct. 2022 (1987), two recent cases dealing with retroactive application of statute of limitations rulings, were consistent with that policy. In *Goodman*, the Court's decision that a state's personal injury statute of limitations should govern § 1981 cases was applied retroactively, the Court stating

that no clear precedent had existed at the time the complaint was filed. Moreover, the ruling on which statute of limitations applied could not have been dispositive of the entire case, but bore only on the period of time for which damages could be claimed. In *Saint Francis College*, the Court did not decide what the proper statute of limitations was (a decision later made by it in *Goodman*), but assumed that *Wilson v. Garcia* controlled as the Third Circuit had held. On that basis, it then applied the *Chevron* test to determine whether its earlier decision should be given retroactive effect.

Accordingly, the Court's decision here should be applied to the present case.

CONCLUSION

For these reasons and those presented in the opening brief, the judgment of the Court of Appeals should be reversed with directions that the action be dismissed.

Dated: Albany, New York
September 28, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

CHARLES R. FRASER
ALAN W. RUBENSTEIN
Assistant Attorneys General
of Counsel

AMICUS CURIAE

BRIEF

No. 87-56

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JAVAN OWENS AND DANIEL G. LESSARD,

Petitioners,

-v.-

TOM U.U. OKURE

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE THE CITY OF NEW YORK

PETER L. ZIMROTH,
Corporation Counsel,
Attorney for
Amicus Curiae
City of New York,
100 Church Street,
New York, New York 10007.
(212) 566-6037

LEONARD J. KOERNER,*
EDWARD F. X. HART,
JOHN P. WOODS,
of Counsel.
*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 87-56

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JAVAN OWENS AND DANIEL G. LESSARD,

Petitioners,

-v.-

TOM U.U. OKURE

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of reversal of the judgment of the Court of Appeals for the Second Circuit. In the instant case, the Circuit

Court held that the statute of limitations for actions brought pursuant to 42 U.S.C. §1983 is the three year limitations period for unintentional personal injury derived from New York Civil Procedure Law and Rules ("N.Y.C.P.L.R.") §214(5) rather than the one year limitations period for intentional torts derived from N.Y.C.P.L.R. §215(3).

The City of New York is a frequent defendant in actions brought pursuant to 42 U.S.C. §1983. For example, between 1984 and 1987 approximately 880 lawsuits brought pursuant to 42 U.S.C. §1983 were filed against the City and its employees. In a number of these cases in the District Court the City asserted that the appropriate statute of limitations is the one year period derived from N.Y.C.P.L.R. §215(3) and submitted an amicus brief in support of this position to the Circuit Court in the instant case. New York City has a substantial

interest in the outcome of this case since the application of the proper statute of limitations will prevent stale claims from being asserted against it and its employees.

SUMMARY OF ARGUMENT

The court below erred in adopting the three year New York statute of limitations for actions for unintentionally caused personal injury rather than the one year statute for intentional personal injury.

This Court has ruled that the appropriate statute of limitations to be applied to actions brought pursuant to 42 U.S.C. §1983 is the statute of limitations for actions alleging personal injury. New York, like many other states, has two statutes of limitations for personal injury actions, N.Y.C.P.L.R. 215(3) providing a one-year statute of limitations for intentional injuries such as assault and battery, false arrest and

malicious prosecution and N.Y.C.P.L.R. §214(5) providing a three-year period for all other personal injuries. N.Y.C.P.L.R. §215(3) has consistently been interpreted by New York courts to apply to all intentional torts and N.Y.C.P.L.R. §214(5) to negligent torts.

The majority of the Circuit Court in the instant case chose to apply the limitations period for unintentional torts on the ground that it is more "general" than the period for intentional torts. In a dissenting opinion, Judge Van Graafeiland would have had the Court hold that, in view of Congress's expressed purpose in enacting the Civil Rights Act of 1871 of providing a remedy for intentional, violent acts, the most analogous limitations period is one for intentional torts. Three other circuits have held that the statute of limitations for intentional torts is the more appropriate to borrow. The

legislative history of 42 U.S.C. §1983 confirms that the complaints for which Congress sought to provide a remedy through §1983 were atrocities committed in the post-bellum South which clearly sounded in the nature of intentional torts. This Court has, moreover, repeatedly required considerably more than negligent conduct to establish liability under 42 U.S.C. §1983.

ARGUMENT

THE APPROPRIATE NEW YORK STATUTE OF LIMITATIONS FOR PERSONAL INJURY TO BE APPLIED IN ACTIONS BROUGHT PURSUANT TO 42 U.S.C. §1983 IS THE ONE YEAR PERIOD FOR INTENTIONAL TORTS.

When enacting the Civil Rights Act of 1871 (42 U.S.C. §1983), Congress did not provide a statute of limitations but rather directed in 42 U.S.C. §1988 that the federal courts should apply the most analogous state statute of limitations provided that such statute was not inconsistent with the policies underlying the federal cause of action.

In Burnett v. Grattan, 468 U.S. 42, 47-48 (1984), this Court directed the lower courts to follow a "three step" process in determining the appropriate statutory period to apply:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights

> statutes] into effect. If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States." Ibid.

Applying that test to §1983 in a consistent fashion, however, proved difficult. The Circuit Courts diverged in several directions with some courts focusing on the factual nature of the federal claim and applying the state period for such a claim (see e.g. Gashgai v. Lebowitz, 703 F.2d 10 [1st Cir. 1983]; McClam v. Barry, 697 F.2d 366 [D.C. Cir. 1983]; Meyers v. Pennyback Woods Home Owners Association, 559 F.2d 894 [1st Cir. 1983]), while other courts sought to adopt a common characterization for all civil rights claims and then apply the most appropriate state

period. See e.g., Clark v. Musick, 623 F.2d 89, 92 (9th Cir. 1980); Braden v. Texas A&M University System, 636 F.2d 90, 92 (5th Cir. 1981); Beard v. Robinson, 563 F.2d 331, 336-37 (7th Cir. 1977), cert. denied, 483 U.S. 907 (1978). The Second Circuit chose to apply the limitations period provided in N.Y.C.P.L.R. §214(2) for causes of action created by a statute. Pauk v. Board of Trustees of the City University, 654 F.2d 856 (2d Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

In Wilson v. Garcia, 471 U.S. 261 (1985), this Court sought to bring consistency to these determinations. The Court granted certiorari to review a dismissal of a §1983 claim as untimely under a two-year statute of limitations in the New Mexico Tort Claims Act, which applied to "actions against a governmental entity or a public employee for torts" N. Mex. Stat.

Ann. §41-4-15(a) (1978) quoted in Wilson v. Garcia, 471 U.S. at 263, n.2. Plaintiffs had argued below for the application of a three year period for actions for injury to the person or reputation of any person". 471 U.S. at 264, n.4. On appeal, the Court of Appeals for the Tenth Circuit chose to apply the three year New Mexico statute for personal injury. Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984).

After discussing the three step process set forth in Burnett v. Grattan, this Court found no basis for applying federal law and proceeded to the "second" step of the analysis, the choice of the "most appropriate" or "most analogous" New Mexico statute. 471 U.S. at 268. The Court initially noted that, because of the wide variety of underlying claims which could support a §1983 claim, a simple broad characterization of all §1983 claims in each

state complies best with the statute's remedial purpose. 471 U.S. at 275. The Court concluded that the directive of §1988 was "to select, in each state, the one most appropriate statute of limitations for all §1983 claims" and that the "tort action for recovery of damages for personal injuries" was the best alternative available. 471 U.S. at 276. Examining the legislative history of §1983, the Court determined that the "atrocities" which had concerned Congress and led to the enactment of the Civil Rights Act of 1871 plainly sounded in tort (471 U.S. at 277):

> Relying on this premise we found tort analogies compelling in establishing the elements of a cause of action under §1983, Monroe v. Pape, 365 U.S. at 187, and in identifying the immunities available to defendants, Briscoe v. LaHue, 460 U.S. at 330; City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981); Pierson v. Ray, 386 U.S. 547, 553-557 (1967). As we have noted, however, the §1983 remedy encompasses a broad range of

> potential tort analogies, from injuries to property to infringements of individual liberty.
>
> Among the potential analogies, Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract.

The Court concluded (471 U.S. at 278):

> Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized §1983 as conferring a general remedy for injuries to personal rights.

In support of this proposition, the Court specifically rejected the application of several other possible statutes of limitations, including the statute of limitations for a cause of action created by a statute and special statutes of limitations provided for remedies for wrongs committed by public officials. 471 U.S. at 278.

Another consideration weighing in favor of the application of the personal injury

limitations period is that it is unlikely to be manipulated by state legislatures (471 U.S. at 279):

> The characterization of all §1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by §1983. General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when §1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

The potential difficulty with the approach adopted by the Wilson Court, anticipated by Justice O'Connor in a dissenting opinion (471 U.S. at 286-287), is what choice must be made in the case of states which, like New York have two separate statutes of limitations for personal injury, one for intentional tort and the other

for unintentional torts. That issue is now squarely before this Court.

The New York Civil Practice Law and Rules provides two periods of limitations for personal injury actions. N.Y.C.P.L.R. §214(5) applies to "an action to recover damages for a personal injury except as provided in sections 214-b and 215." N.Y. C.P.L.R. §215(3) applies to "an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law."

It is clear from the language of the statutes and their interpretation by New York courts that N.Y.C.P.L.R. §215(3) was designed to apply to intentional torts and N.Y.C.P.L.R. §214(5) to negligent torts. Although N.Y.C.P.L.R. §215(3) lists a

number of specific torts, New York courts have applied N.Y.C.P.L.R. §215(3) to intentional torts not specifically enumerated in the statute, such as intentional infliction of emotional distress, tortious hrassment and abuse of process. Parker v. Port Authority of New York and New Jersey, 113 A.D.2d 763, 493 N.Y.S.2d 355 (2d Dep't 1985); Goldner v. Sullivan, Gough, Skipworth, Summers and Smith, 105 A.D.2d 1149, 482 N.Y.S.2d 606 (4th Dep't 1984); Schulman v. Krumholz, 81 A.D.2d 883, 439 N.Y.S.2d 160 (2d Dep't 1981); Hansen v. Petrone, 124 A.D.2d 782, 508 N.Y.S.2d 500 (2d Dep't, 1986. The Practice Commentary to the N.Y.C.P.L.R. by Judge Joseph McLaughlin supports the view that the primary focus of N.Y.C.P.L.R. §215(3) is intentional acts rather than merely the enumeration of specific torts. It states:

> What distinguishes the torts governed by [§215(3)] from those

> governed by C.P.L.R. 214(5) is an intent by the defendant to inflict consequences upon the plaintiff. C.P.L.R. 214(5) governs negligence actions, generally those where the defendant does not intend to affect the plaintiff.

As Judge Van Graafeiland stated in dissent below, the list of torts encompassed by N.Y.C.P.L.R. §215(3) is "broad enough to include almost all of the intentional personal injuries recognized at common law" and New York courts have consistently interpreted N.Y.C.P.L.R. §215(3) to include unlisted torts of an intentional nature while "routinely" characterizing it as the statute of limitations for "intentional" torts. Okure v. Owens, 816 F.2d 45, 50 (2d Cir. 1987).

The focus on the intentional element of N.Y.C.P.L.R. §215(3) is particularly apparent in Rausch v. McVeigh, 105 Misc.2d 163, 431 N.Y.S.2d 887 (Sup.Ct. Albany Co., 1980). The plaintiff sought to recover damages incurred when he was attacked by

an autistic child. Id. at 164. The defendants moved to dismiss the complaint as untimely pursuant to N.Y.C.P.L.R. §215(3) which specifically applies to assaults. Id. at 165. The Court chose to apply the three-year period for unintentional injury provided in N.Y.C.P.L.R. §214(5), reasoning that (Id. at 165):

> ... the key element to be discerned is that of intent. "Negligence is distinguished from assault and battery by the absence of the intent which is a necessary ingredient of the latter" (Jones v. Kent, 35 A.D.2d 622). It is alleged herein that defendant, William McVeigh, Jr., is incapable of forming an intent to commit a tort of assault.

The Court held that, because of the absence of intent, the limitations period for negligent actions rather than that for assault is applicable. The key to determining whether to apply N.Y.C.P.L.R. §214(5) or N.Y.C.P.L.R. §215(3) is the characterization

of the alleged offending act as intentional or non-intentional.

A. The Legislative History of §1983 and the Interpretation of §1983 by this Court Establish That §1983 is a Remedy for Actions Analogous to Intentional Rather Than Negligent Torts

(1)

The present 42 U.S.C. §1983 originates in the first section of the Civil Rights Act of 1871, known as the Ku Klux Klan Act of 1871. See Briscoe v. LaHue, 460 U.S. 325, 337 (1983). As this Court has repeatedly recognized, the underlying conduct which Congress sought to combat by providing a remedy was extremely violent in nature and was perpetrated for the most part by secret, conspiratorial organizations, particularly the Ku Klux Klan. See, e.g. Wilson v. Garcia, 471 U.S. at 276; Briscoe v. La Hue, 460 U.S. at 337. A detailed examination of the debates leading to the passage of §1983

makes it clear that the 42nd Congress was exclusively concerned with intentional acts constituting intentional torts.

The immediate catalyst for the Civil Rights Act of 1871 was President Grant's message to Congress of March 23, 1871, asserting that: "A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous." Since "the power to correct these evils [was] beyond the control of State authorities" and it was unclear that the power of the executive under existing laws was sufficient, President Grant urgently recommended "such legislation as in the judgment of Congress shall effectually secure life, liberty and property, and the enforcement of law in all parts of the United States." Cong. Globe, 42d Cong., 1st Sess. 244 (1871).

The "condition of affairs" to which President Grant referred had been brought to light in testimony before a Senate committee investigating conditions in the states which had recently been in rebellion. This testimony was liberally quoted during the floor debates preceding the passage of the Act and provides a clear illustration of the type of conduct for which Congressional supporters of the Act sought to provide a remedy. For example, Representative Stoughton quoted from the testimony describing the hanging of a negro man taken at night from his house by a group of eighty to a hundred men. Cong. Globe, 42d Cong., 1st Sess. 320 (1871). Representative Cobb read a list of the names of twenty individuals, both black and white, who had been victims of whippings, shootings and other violence in the county of Lincoln, North Carolina, together with a similar list

of fifty-six victims from Alamance County, North Carolina, and quoted testimony describing assaults upon and an attempted rape of members of a black family. Cong. Globe, 42d Cong., 1st Sess. 438. Representative Elliot supplemented the testimony from the Senate Hearings with similar material from a report of an investigating committee of the Legislature of South Carolina, which was seeking "the causes of the intimidation, outrages, and murder perpetrated preceding and at the general election of 1868." Cong. Globe, 42nd Cong., 1st Sess. 390.

The spectre of deliberate Ku Klux Klan violence dominated the substance and tenor of the 1871 Congressional debates.[1] A large

---

[1] Even the opponents of the Act focused their arguments on the violent and deliberate acts which were alleged to be commonplace in
(Footnote Continued)

percentage of the approximately six hundred pages of debates chronicled in the Congressional Globe are filled with harrowing stories of deliberate violence. Thus, the conclusion of this Court in Wilson v. Garcia, 471 U.S. at 277, that "[t]he atrocities that concerned Congress in 1871 plainly sounded

---

(Footnote Continued)
the South. A few congressmen went as far as to deny that there was a problem of any dimension, see Cong. Globe at 397 (Representative Rice), while others took the position that the frequency and pervasiveness of violence and terror was being exaggerated by the Republican supporters of the Act. See Cong. Globe at 377 (Representative Waddle); Cong. Globe at 418 (Representative Bright); Cong. Globe at 431 (Representative McHenry); Cong. Globe at 440 (Representative Price); Cong. Globe at 599 (Senator Saulsbury). Others were willing to blame the outbreaks of violence on Northern interference (Cong. Globe at 386 (Representative Lewis), or said that violence was common to both sides (Cong. Globe at 416 (Representative Biggs). Finally, some felt that whatever the extent and nature of the disturbances, passage of the act was unnecessary. There was, however, no disagreement as to the intentional nature of the acts alleged to be taking place.

in tort" is historically unassailable. It is also clear that these acts "sounded" as intentional torts, the concept of "negligent" atrocities being inherently contradictory.

(2)

The Circuit Courts have divided evenly on the issue of whether to apply the statute of limitations for intentional tort or for unintentional tort in states having more than one torts limitations period. The first and most thorough review of the issue came in Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985), cert. denied, 106 S.Ct 893 (1986), which distinguishes between trespass and trespass on the case. Under Alabama law, trespass is "an intentional act done with force and immediate injury to the person of another or to property in his or her possession" to which a six-year statute of limitations is applicable. Id. at 1254. Trespass on the case occurs "when the

wrongful act causes harm only indirectly and without an intentional use of force" and has a one-year statute of limitations. Id. The Eleventh Circuit characterized §1983 claims as akin to trespass and applied the Alabama statute of limitations for actions "for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section" rather than the limitations period for "any trespass on the case." The Court noted that, although some §1983 claims involve direct and intentional injury and thus sound in "trespass", others involve indirect and unintentional injury and sound in "trespass on the case." Id.

Following the analysis of this Court's decision in Wilson v. Garcia, 471 U.S. 261, the Court then determined that the specific historic catalyst for the Civil Rights Act of 1871 was the deliberate campaign of violence and terror practice by the Ku Klux Klan and

that Congress had been especially concerned with "whippings, lynching and banishing." Id. The Court noted that, "[t]hese acts of violence are all 'direct' and intentional injuries to the person." Id. It then reasoned that (763 F.2d at 1256):

> [t]he appropriate characterization of Section 1983 personal injury claims must be determined by searching the legislative history of the statute and isolating the particular type of wrong that was most pragmatic, the one category of wrongs that the legislators intended first and foremost to address.
>
> * * * * *
>
> The paradigmatic personal injuries covered by the statute, those that motivated the Congress to take action, were actions of intentional and direct violence on the part of the Ku Klux Klan.
>
> * * * * *
>
> The extensive legislative history demonstrates that members of the 42d Congress considered direct acts of violence against black citizens to be the paradigmatic wrong addressed by the new statute. Hence the essential nature of a Section 1983 claim fits

the description of trespass under Alabama law. We conclude on the basis of Congressional intent and the Supreme Court's opinion in Wilson v. Garcia, supra, that a Section 1983 claim should be characterized as a personal injury action along the lines of a trespass.

In Gates v. Spinks, 771 F.2d at 916 (5th Cir. 1985), cert. denied, 106 S.Ct. 1378 (1986), the Court of Appeals for the Fifth Circuit relied on the Eleventh Circuit's reasoning in Jones v. Preuit & Mauldin in its application of a limitations period for unintentional tort (1972).[2]

In Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), cert. denied, 106 S.Ct. 2902 (1986), the Sixth Circuit also applied an intentional tort statute of limitations of

---

[2] The language of the statutes in Gates is similar to that of N.Y.C.P.L.R. §214(5) and N.Y.C.P.L.R. §215(3).

§1983 claims, relying upon this Court's reasoning in Wilson.

The Court of Appeals for the First Circuit, however, chose to apply a six-year Maine statute of limitations applicable to all other "personal injury" claims except for those instituted against certain professionals rather than a two-year limitations period applicable to defamation, assault and battery, false imprisonment and medical malpractice. Small v. Inhabitants of the City of Belfast, 796 F.2d 544, 546 (1st Cir. 1986). The Court first noted the wide range of topics which are involved in §1983 claims and observed that many of those actions are not easily characterized as "intentional" or "unintentional" and often "can only be characterized very generally as claims involving 'personal injuries'". Id., at 546. The Court compared the breadth of the Maine catchall statute with that of the two

year statute which it characterized as a "narrow exception" applicable only to a few causes of action and then rejected the two year period not properly applicable to a §1983 action. See also Banks v. Chesepeake and Potomac Telephone Company, 802 F.2d 1416 (D.C. Cir. 1986), where the Court indicated in dicta that it would apply the catchall provision rather than the specific limitations period applicable to intentional torts.

The Second Circuit in the majority opinion below adopted a similar reading for the two New York statutes of limitations at issue herein. Okure v. Owens, 816 F.2d 45 (2d Cir. 1987). While recognizing that "civil rights violations are typically, and perhaps necessarily, intentional", the Court stated that "characterization" was "not controlling" and fastened upon the use of the term "general" by this Court in Wilson v. Garcia,

471 U.S. at 278 to describe "personal injury actions" analogous to §1983. Id. at 48. The Circuit Court concluded that by employing the term "general personal injury actions", this Court was directing that the choice of the appropriate statute should be "expansive enough to accommodate the diverse personal injury torts that §1983 has come to embrace so as not to exclude claims that stray from a precisely drawn analogy". Id. at 48.

Turning to the two New York statutes at issue, the Second Circuit held, without citation to authority, that "by nature" N.Y.C.P.L.R. §214(5) was "general" while N.Y.C.P.L.R. §215(3) was "more specific and exceptional" and, thus, the teaching of Wilson required that the three-year statute should be applicable rather than the

one-year statute.[3] The majority below further reasoned that because the "tortious nature of many injuries to personal rights" or the "constitutional dimension" of the injury may not be "immediately obvious", there must be "time for plaintiffs to reflect and probe." Id., at 48-49.

In his dissent, Judge Van Graafeiland challenged the groundless assumption made

---

[3] As Judge Van Graafeiland correctly stated in dissent below, this Court employed the term "general personal injury actions" in Wilson in the context of distinguishing such personal injury actions from suits against public officials and should not be read as an indication of the choice of statute to be applied here. This is particularly true since, of the two New Mexico statutes which could "conceivably" have been applicable in Wilson, this Court chose to apply a three-year statute for actions for "an injury to the person or reputation of any person" N.M. Stat. Ann. §37-1-8 (1978) cited in Wilson v. Garcia, 471 U.S. at 264, n.4, rather than a more "general" four-year "catchall" statute for "all other actions not herein otherwise provided for and specified." N.M. Stat. Ann. §37-1-4 (1978), cited in Wilson v. Garcia, 471 U.S. at 264, n.5.

by the majority that N.Y.C.P.L.R. §215(e) is less "general" and more "narrow" than the catchall statute N.Y.C.P.L.R. §214(5). Okure v. Owens, 816 F.2d at 49-51. Judge Van Graafeiland examined the legislative history of §1983 and this Court's interpretation of the elements of a §1983 claim and concluded that "there simply is no room for disagreement that section 1983 originally was directed at acts of deliberate wrongdoing and that, even today, it is relied upon almost invariably as a safeguard against the intentional deprivation of civil rights." Id., at 51.

The dissent also took exception to the majority's conclusion that federal policy considerations required that plaintiffs have more than one year to "reflect and probe", stating that no more than a "tiny fraction of the victims of civil rights violations are not immediately aware of their injury" and

"almost invariably" those victims are prepared to commence an action "within a matter of months, if not weeks" Id., at 53. Those few cases where the victim was aware of the injury usually "raised the question of when the limitation period starts, not how long it runs" and were sufficiently "rare" that it was not necessary to select a statute to accommodate them. Id. at 53.

The essence of the holdings in Small and Okure and the dicta in Banks is that the "general catchall" statute of limitations provides the appropriate limitations period for of §1983 claims rather than a statute of limitations which is tailored specifically for intentional torts, although intentional torts are more "paradigmatic" of §1983 claims and more closely address the concerns of Congress in enacting §1983 . The reasoning of these cases turns primarily upon the structure of the statutes. The New York

statutes are typical of the structure in most states with dual limitations periods for torts in that there is one statute which provides for a laundry list of typical intentional torts and a catchall statute covering all other actions to recover for personal injuries. Chosing to apply the one "general" statute leaves the choice of the appropriate period of limitation to turn fortuitously upon the manner in which a state drafts its statute of limitations. Presumably, by the reasoning of the majority below, the result here would have been different had the New York legislature structured its statute differently. Thus, a state desiring to discriminate against federal claims could accomplish its goal simply by expanding the list of causes of actions specifically covered in the intentional tort limitations period to include all known types of claims and relegating federal civil rights claims to a "general"

catchall statute with a shorter limitations period. The period of limitations applicable to important federal rights should not turn on such vagaries of draftmanship.

Another point dividing the circuit courts stems from the broad range of actions which §1983 has, in recent years, come to encompass and the types of claims which the 42nd Congress undoubtedly contemplated when it enacted the statute in 1871 and which are still most typical of §1983 claims. See Smalls v. Inhabitants of the City of Belfast, 796 F.2d at 546. The courts which have focused on the breadth of §1983 have tended to apply the more general "catchall" provisions which primarily cover negligent conduct. This position, however, compels the application of a statute which specifically excludes the most "paradigmatic" and typical actions brought under §1983 such as excessive force, false arrest, malicious

prosecution and the types of misconduct for which Congress clearly sought to provide a remedy in 1871, in order to accomodate actions which were not contemplated by Congress and which arguably stretch the boundaries of §1983. These strained and hypertechnical readings of the statutes are contrary to the rationale enunciated by this Court for its selection of the period for personal injury actions. That the "most analogous" state cause of action does not flawlessly reflect each and every type of federal civil rights claim is neither surprising nor troublesome. Since civil rights claims "can have no precise counterpart in state law" and "it is 'the purest coincidence,' when state statutes or the common law provide for equivalent remedies[,] any analogies are bound to be imperfect." Wilson v. Garcia, 471 U.S. at 272 (citations omitted).

B. Proper Characterization of §1983 Claims

The characterization of §1983 claims as intentional torts is strongly supported by case law holding that mere negligence does not provide a basis for civil rights claims. This Court and the lower courts have consistently refused to entertain actions under §1983 which are based on merely negligent acts. Claims for denial of medical treatment under the Eighth Amendment, for example, require not merely medical malpractice but deliberate indifference to the known needs of a prisoner. Estelle v. Gamble, 429 U.S. 97, 104-06 (1976). Eighth Amendment claims arising from prison disturbances or prison conditions require a showing of "obduracy and wantonness, not inadvertance or error in good faith." Whitley v. Albers, 475 U.S. 312, 319 (1986).

Claims of racial or gender discrimination under the Equal Protection Clause require

proof of discriminatory intent, not merely accidental, negligently caused effects. See, e.g., Personnel Administrator v. Feeney, 442 U.S. 256 (1970)(gender discrimination); Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) (racial discrimination). Even where a constitutional violation has been established, the Supreme Court has held that public officials are entitled to a "qualified" or "good faith" immunity unless the official's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known". Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Indeed, many §1983 claims based on negligent actions have been rejected. See, e.g., Sampson v. King, 693 F.2d 566 (5th Cir. 1982)(no §1983 claim based on negligent use of pesticide on a prison farm); Mulligan v. City of Newport News, 743 F.2d 227 (4th

Cir. 1984) (no §1983 claim based on negligent handling of victim by ambulance personnel); Rittenhouse v. DeKalb City, 575 F.Supp. 1173 (N.D. Ga. 1983) (no §1983 claim based on failure to repair water leak leading to icy conditions which caused automobile accident).

In Daniels v. Williams, 474 U.S. 327 (1986), this Court overruled its suggestion in Parratt v. Taylor, 451 U.S. 526 (1981), that a mere negligent deprivation of property could give rise to a claim pursuant to 42 U.S.C. §1983. In holding that mere lack of due care by a state official cannot deprive an individual of life, liberty or property under the Fourteenth Amendment, the Court noted that "[h]istorically, this guarantee of due process had been applied to deliberate decisions of government officials to deprive a person of life, liberty of property." Daniels v. Williams, 474 U.S. 327 (1986) (emphasis

in original). See also Davidson v. Cannon, 474 U.S. 344 (1986). "[T]o hold that this kind of loss [an injury caused by negligence] is a deprivation ... within the meaning of the Fourteenth Amendment seems not only to trivialize but grossly to distort the meaning and intent of the Constitution." Daniels v. Williams, 474 U.S. 330 (quoting Parratt v. Taylor, 451 U.S. 545, [1981] [Steward, concurring]).

C. The Application of N.Y.C.P.L.R. §215(3) to §1983 Claims is Consistent With Federal Law

As demonstrated above, the tort limitations period of N.Y.C.P.L.R. §215(3) is the most analogous to §1983 claims. Under the 3-step analysis provided in Burnett v. Grattan and applied in Wilson v. Garcia, N.Y.C.P.L.R. §215(3) must be applied to §1983 claims unless it is determined to be "inconsistent" with federal law so as to make its use inappropriate. Burnett v. Grattan,

468 U.S. 42; Wilson v. Garcia, 471 U.S. at 279.

Demonstrating inconsistency requires a showing that application of the statute would defeat the policy behind the federal law. See Johnson v. Railway Express Agency 421 U.S. 454 (1975). To establish that a limitations period is inconsistent with federal law, more must be demonstrated than that the application of a particular period would be less favorable to plaintiffs than the application of a different period. As this Court stated in Robertson v. Wegmann, 436 U.S. 584, 593 (1978):

> A state statute cannot be considered inconsistent with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the §1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its sources would be essentially irrelevant.

Nothing in the decisions of this Court mandates the conclusion that a period of one year is so short as to be "inconsistent" with the Constitution and laws of the United States. This Court has several times approved the application of statutes of limitations with periods as short as the one-year period provided by N.Y.C.P.L.R. §215(3) without expressing any reservations as to their consistency with Federal law. See Chardon v. Fumero Soto, 462 U.S. 650 (1983) (Puerto Rico); Chardon v. Fernandez, 454 U.S. 6 (1981) (same); Johnson v. REA, 421 U.S. 454 (1975) (Tennessee); O'Sullivan v. Felix, 233 U.S. 318 (1914) (Louisiana).

Many states have, moreover, a single, one-year statute of limitation for all personal injury actions. The holding in Wilson will result in a one year statute being applied in those states. See, e.g., Washington v.

Breaux, 782 F.2d 553 (5th Cir. 1986) (applying Louisiana's one-year statute); Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986), cert. denied, 107 S.Ct. 928 (1987)(California); Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), cert. denied, 106 S.Ct 2902 (1986) (Ohio); Gates v. Spinks, 771 F.2d 916 (5th Cir. 1985) (Mississipi); Altair Corp. v. Pesquera De Busquets, 769 F.2d 30 (1st Cir. 1985) (Puerto Rico); Burkhardt v. Randles, 764 F.2d 1196 (6th Cir. 1985) (Tennessee). There is, moreover, no guarantee that the "broader" statute of limitations or the one applicable to "unintentional" or "negligent" conduct will always provide a longer limitations period. In Jones, the Eleventh Circuit applied a six-year intentional statute of limitations rather than a one-year unintentional statute. Jones v. Preuit & Mauldin, 763 F.2d at 1253-1254 (11th Cir. 1985).

CONCLUSION

N.Y.C.P.L.R. § 215(3) is consistent with federal law, is applicable to the abuses for which Congress intended a remedy, is not readily amenable to manipulation to discriminate against federal claims and provides potential plaintiffs with adequate time in which to seek relief from the courts. The judgment of the Second Circuit should, therefore, be reversed and N.Y.C.P.L.R. §215(3) should be applied to §1983 claims in New York State.

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel,
Attorney for Amicus Curiae
City of New York.

LEONARD J. KOERNER,*
EDWARD F. X. HART,
JOHN P. WOODS,
of Counsel.
*Counsel of Record

AMICUS CURIAE

BRIEF

No. 87-56

In The
Supreme Court of the United States
October Term, 1987

JAVAN OWENS and
DANIEL G. LESSARD,

Petitioners,

v.

TOM U. OKURE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATES OF NEBRASKA, WYOMING, ARKANSAS, OKLAHOMA, SOUTH DAKOTA, WISCONSIN, SOUTH CAROLINA, KANSAS AND MISSOURI, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

THE STATE OF NEBRASKA
ROBERT M. SPIRE
Attorney General
Mark D. Starr*
Asst. Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

THE STATE OF WYOMING
JOSEPH B. MEYER*
Attorney General
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

*Counsel of Record

(Additional Counsel Listed on Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

THE STATE OF ARKANSAS
JOHN STEVEN CLARK*
Attorney General
201 East Markham Street
Heritage West Building
Little Rock, AK 72201
(501) 371-2007

THE STATE OF OKLAHOMA
ROBERT H. HENRY
Attorney General
David Lee*
Asst. Attorney General
112 State Capitol
Oklahoma City, OK 73105
(402) 521-3921

THE STATE OF
SOUTH DAKOTA
ROGER A. TELLINGHUISEN*
Attorney General
State Capitol Building
Pierre, SD 57501
(605) 773-3215

THE STATE OF WISCONSIN
DONALD J. HANAWAY*
Attorney General
P.O. Box 7857
Madison, WI 53707
(608) 266-9945

THE STATE OF
SOUTH CAROLINA
T. TRAVIS MEDLOCK*
Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

THE STATE OF KANSAS
ROBERT T. STEPHAN*
Attorney General
Judicial Center—2nd Floor
Topeka, KS 66612
(913) 296-2215

THE STATE OF MISSOURI
WILLIAM L. WEBSTER*
Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

The States of Nebraska, Wyoming, Arkansas, Oklahoma, South Dakota, Wisconsin, South Carolina, Kansas and Missouri as amici curiae pursuant to Supreme Court Rule 36.4, urge the Court to reverse the judgment of the United States Court of Appeals for the Second Circuit in *Okure v. Owens,* 816 F.2d 45 (2nd Cir. 1987) for the reasons set forth herein. The petition for writ of certiorari was granted on March 21, 1988.

—o—

INTEREST OF AMICI CURIAE

Amici, like the State of New York, have more than one statute of limitations which may apply to actions brought under 42 U.S.C. § 1983.

State officials, particularly those in the Department of Corrections, are being bombarded by civil rights actions. The alleged improprieties giving rise to these lawsuits are often relatively insignificant and not memorable in comparison to the murders and other acts of physical violence which gave rise to the passage of the Civil Rights Act in 1871. Therefore, amici have a strong interest in the outcome of the present case as its resolution will directly bear upon whether the benefits of the statutes of limitations can be retained—those being to require a plaintiff to plead his case within a reasonable time so that the defendant may be able to better recall the incident, identify witnesses and secure pertinent evidence.

Amici also have an interest in promptly identifying and correcting patterns of unconstitutional conduct on the part of state officers and employees. Which statute of

limitations is chosen may impact on the amount of deterrent effect meritorious civil rights actions will have. If an action is filed soon after the alleged deprivation there will be a greater likelihood that others will be saved from suffering the same experience than if the action were filed years later.

—o—

SUMMARY OF ARGUMENT

Several states, like New York, have more than one statute of limitations arguably covering personal injury tort actions. The selection of an appropriate statute of limitations is more than a technical matter. It directly bears upon the amount of opportunity given to a defendant to recall the facts surrounding the alleged incident, muster witnesses and protect the physical evidence which may be essential to proving his or her case. Keeping in mind that well over half of all civil rights petitions filed are brought by prisoners, for which there is often little, if any, deterrent against false and frivolous pleading, it is imperative that defendants not be deprived of the fairness which statutory limitation periods were designed to secure.

The intentional misconduct which gave rise to the passage of the Civil Rights Act is characterized by its being immediately apparent to the injured party and lacking documentary evidence. These characteristics would logically call for a shorter limitation period. The shorter limitation periods which state laws ordinarily provide for intentional torts upon the person of another best protect a defendant's interest in obtaining a fair trial. Because a

statute of limitations generally does not begin to run until a cause of action accrues and in light of the equitable principles of tolling which have developed, the selection of the shorter limitation periods can be made without jeopardy to the important interest of providing a remedy for constitutional violations.

Furthermore, selection of the generally shorter limitation period for intentional torts better accomplishes the purpose Congress sought by 42 U.S.C. § 1983, deterrence of constitutional violations, as it encourages timely action on the part of plaintiffs.

—o—

ARGUMENT

Introduction

Wilson v. Garcia, 471 U.S. 261, 85 L.Ed.2d 254, 105 S.Ct. 1938 (1985) established guidelines for selecting the appropriate statute of limitations for civil rights actions. The resolution of the issue depended heavily upon the history of the Reconstruction Civil Rights Acts and the Congressional intent expressed in 42 U.S.C. § 1988 that resort be had to state law for guidance in court procedure and practice. In large part because of the types of conduct which the civil rights laws were adopted to address, the limitation period for personal injury claims was selected.

Several states have differing limitation periods depending upon the type of personal injury claim. This has led to a controversy as to whether limitation periods for actions involving injury intentionally inflicted upon the person of another should be selected or whether the or-

dinarily longer limitation periods provided for other categories of tortious injury should be selected. Opting for the former tends to be supported by the fact that the conduct sought to be redressed by Congress is characterized by intentional infliction of injury upon another. The latter view tends to be supported by the breadth of the spectrum of "constitutional torts" presently recognized as actionable under 42 U.S.C. § 1983.

It is expected that the historical argument supporting the selection of the limitation period applicable to intentional torts and a survey of the current division between the Circuits interpreting and applying the *Wilson* case, *Id.*, will be covered in the brief of petitioners Owens and Lessard. Repeating the subjects would probably be of little assistance to the court. Instead, the focus of this discussion will be on the beneficial purposes served by statutes of limitations and how the recognition of these purposes should bear upon the selection of the most appropriate statutory limitation period for Section 1983 actions.

I.

STATUTES OF LIMITATIONS PROTECT DEFENDANTS AND THE COURT FROM HAVING TO DEAL WITH CASES IN WHICH THE SEARCH FOR TRUTH MAY BE SERIOUSLY IMPAIRED BY FADING MEMORIES, LOSS OF EVIDENCE, DISAPPEARANCE OF WITNESSES AND DESTRUCTION OF DOCUMENTS.

In *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed.2d 254, 105 S.Ct. 1938 (1985), this Court concluded that 42 U.S.C. § 1988, "is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for

all § 1983 claims." *Id.* at 275, 85 L.Ed.2d at 266. The Court then considered the historical background of the passage of the Civil Rights Act in characterizing 42 U.S.C. § 1983, "as conferring a general remedy for injuries to personal rights." *Id.* at 278, 85 L.Ed.2d at 268. The Court rejected catch-all periods of limitation for statutory claims as these were scarce when § 1983 was enacted and because the section does not itself create substantive rights. The Court also indicated concern that its characterization of § 1983 claims for statute of limitations purposes not lend itself to the risk that the period of limitations would discriminate against federal claims.

As Justice O'Connor observed in dissent, the *Wilson* decision did not lay the statute of limitations issue to rest. New York is but one of the many states with more than one limitation period applicable to actions for an injury to the person. As Petitioners have noted, at least 26 states plus the District of Columbia fall in this category.[1] For instance, in *Epp v. Gunter*, 677 F.Supp. 1415 (D.Neb. 1988), a case discussing the appropriate statute of limitation to be applied post-*Wilson*, it was observed:

> The Nebraska statutory scheme does not neatly divide tort actions into categories according to their intentional or unintentional characters. Some intentional torts are barred in one year: libel, slander, assault and battery, false imprisonment and malicious prosecution. § 25-208. Fraud, on the other hand, is subject under various situations to a four-year (§ 25-207), a two-year (§ 30-2206), or a five-year statute (§ 30-2206). Trespass on real property; taking, detaining or injuring personal property; and injury to the

---

[1]Footnote 2, Brief in Support of Writ of Certiorari.

> rights of the plaintiff other than contract and fraud are limited by a four year statute. Section 25-207. The time limit for action for malpractice, § 25-208, and professional negligence, § 25-222, is two years. Products liability actions, either for negligence or strict liability, have four-years-after-damage-occurs or a ten-year-after-the-product-was-sold-or-leased-limit. § 25-224. Any action not otherwise mentioned is to be brought within four years. § 25-212.

Id. at 1420.

It appears, then, that the "uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983", *Wilson v. Garcia, supra* at 272, 85 L.Ed.2d at 264, has not been completely surmounted. The amount of time and effort spent in litigating limitations issues is indeed unfortunate. However, the determination of the most appropriate statute of limitations is not unimportant. "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio,* 446 U.S. 478, 487, 64 L.Ed.2d 440, 449, 100 S.Ct. 1790 (1980).

Their importance has long been noted:

> It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of death or removal of witnesses. It has a manifest tendency to produce speedy settlements of account and to suppress those prejudices which must rise up at a distance of time, and baffle even honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate), applicable to such remote times, as may leave no means to trace the nature, extent or origin of the claim, and thus open the way to the most oppressive charges.

Bell v. Morrison, 26 U.S. 351, 360 (1st Pet.) (1828). Similarly:

> Statutes of Limitations . . . are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without attempt to enforce a demand, creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when by loss of evidence from the death of some witnesses and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth." *Riddlesbarger v. Ins. Co.,* 7 Wall., 390 [74 U.S., XIX., 259].

Weber v. Board of Harbor Commissioners, 85 U.S. 57, 70 (18 Wall.) (1873). And further:

> Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349, 88 L.Ed. 788, 64 S.Ct. 582 (1944). These enactments are statutes of repose, and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seri-

> ously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

(Citations omitted). *United States v. Kubrick,* 444 U.S. 111, 117, 62 L.Ed.2d 259, 266, 100 S.Ct. 352 (1979).

A civil rights defendant, then, has an important interest in legislatively established limitation periods as they are inextricably intertwined with his or her ability to receive a fair trial and adequately prepare a defense.

In addition to the possibility that plaintiffs may simply sleep on their rights, there is also the potential for plaintiffs to purposely delay the action in hope that information supplying a defense will be lost. "Without [statutes of limitations], defendants could find themselves at the mercy of unscrupulous plaintiffs who hoard evidence that supports their position while waiting for their prospective opponents to discard evidence that would help make a defense." *Burns v. Board of Supervisors of Stafford County,* 227 Va. 354 at 359, 315 S.E.2d 856 at 859 (1984).

The potential for abuse of a long limitation period is arguably greater in the civil rights context. According to the *Annual Report of the Director of the Administrative Office of the United States Courts, 1987,* the total number of private civil rights petitions filed in the United States District Courts for the twelve month period ending June 30, 1987, was 19,785. During the same period, 23,697 prisoner civil rights actions were filed. (Table C-2 A, Page 182). In some states the difference in number between prisoner and non-prisoner civil rights cases is even more pronounced. For the twelve months ended June 30,

1987, 112 private civil rights petitions were filed in the United States District Court for the District of Nebraska. 372 civil rights petitions were filed in that judicial district by non-federal prisoners in the same period. (*Id.* Table C-3, Page 189). Therefore, special problems of defendants in prisoner actions should not be glossed over as constituting but a small segment of the total picture.

Considerations of expense and the risk of sanctions such as payment of costs and being held in contempt, are often of little force and effect when it comes to prisoner actions, most of which are prosecuted *in forma pauperis.* The frivolous and abusive nature of many of them is illustrated by an order filed on August 25, 1987, jointly by the judges of the United States District Court for the District of Nebraska in regard to a particular inmate who had filed 113 cases in the court since January 1, 1986. *See, In re Billy Roy Tyler,* 839 F.2d 1290 (8th Cir. 1988). The court noted that in all of the cases filed by this prisoner he had been granted leave to proceed *in forma pauperis.* The court then observed that on several occasions defendants had been named in the complaints who had in no way been involved in the events which gave rise to the complaints. His propensity to make broad, conclusional allegations against the defendants was also mentioned. The court continued by stating, "the difficulty insofar as use of the court's resources is concerned, is that a review of Mr. Tyler's pleadings alone is insufficient to determine whether the facts therein alleged are true; for that purpose a trial, hearing, or the presentation of affidavit testimony or records, is required in most cases." *Id.* at 1293-94. The court then restricted the prisoner to one filing per month, noting the uselessness of other types of sanctions:

> His lack of funds, however, also precludes the typical sanctions available to the courts for imposition upon other abusive litigants, such as those permitted by Rule 11, Fed.R.Civ.P. imposing costs and attorneys fees upon such parties.
>
> Verification of pleadings may in some small measure thwart the use of such allegations as may be outright mistruths, but without a monetary or other sanction to penalize false verification, short of criminal prosecution, this requirement appears to us to be of little value.

Id. at 1294. The court also noted that excessive litigation imposes burdens upon court resources, causes public dissatisfaction with and frustration with the courts, and "results in prolonged, repetitive harassment of defendants causing frustration and often extraordinary and unreasonable expenditures of time and money defending against unfounded claims." *Id.* at 1293.

This same problem was discussed in *Phillips v. Mashburn*, 746 F.2d 782 (11th Cir. 1984), as follows:

> "Persons proceeding in forma pauperis are immune from imposition of costs if they are unsuccessful; and because of their poverty, they are practically immune from later tort actions for 'malicious prosecution' or abuse of process. Thus indigents, unlike other litigants, approach the courts in the context where they have nothing to lose and everything to gain. The temptation to file complaints that contain facts which cannot be proved is obviously stronger in such a situation. For convicted prisoners with much idle time and free paper, ink, law books and mailing privileges the temptation is especially strong. As Justice Rehnquist has noted, 'Though [an inmate] may have been denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse.'

> *Cruz v. Beto*, 405 U.S. 319, 327, 92 S.Ct. 1079, 1084, 31 L.Ed.2d 263 (1972) (dissenting)." *Jones v. Bales*, [58 F.R.D. 453 at 463 (N.D. Ga. 1972) *aff'd*, 480 F.2d 805 (5th Cir. 1973)]. Such prison recreation imposes significant costs on the judicial system and the general public. Frivolous suits unduly burden the courts, obscure meritorious claims, and require innocent parties to expend significant resources in their defense. Finally, meritless actions offer inmates an unrestricted method of harassing prison and law enforcement officials.

Id. at 784-785.

As was said in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982),

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." (footnotes and citations omitted).

Id. at 814, 73 L.Ed.2d at 408.

In the case of correctional official defendants, "the individual's burden might be alleviated by the government's provision of counsel, but a case that goes to trial always imposes significant emotional and other costs on every party litigant." *Briscoe v. Lahue*, 460 U.S. 325, 344, 75 L.Ed.2d 96, 113, 103 S.Ct. 1108 (1983).

As the number of prisoner cases have grown, so have the kinds of matters deemed actionable. The subject mat-

ter of these cases has gone well beyond the "wave of murders, lynchings, and whippings" which § 1983 was designed to stop. *Goodman v. Luckens Steel Co.*, — U.S. --, —, 96 L.Ed.2d 572 at 588, 107 S.Ct. 2617 (1987) (Brennan, Marshall, and Blackmun, dissenting). They are frequently ordinary, day to day, seemingly innocuous occurrences. The cases of *Daniels v. Williams,* 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) (fall caused by pillow left on stairs) and *Parratt v. Taylor,* 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), overruled in part, *Daniels v. Williams, supra,* (disappearance of $23.50 hobby kit) are illustrative. The pivotal factual questions in these types of cases may be an employee's whereabouts at the time the hobby kit turned up missing or the amount of time that had passed between the last stairway check and the time of the plaintiff having tripped over a pillow left there. In *Hawthorne v. Wells,* 761 F.2d 1514 (11th Cir. 1985), the appellate court adopted the trial court's explanation for the particular need for prompt notice of suit in prisoner cases as follows:

> [f]or many of the federal officials sued, the alleged constitutional abuse is merely one of hundreds of similar routine transactions that occur in the course of a year's time at the prison facility. For instance, a prison guard may conduct hundreds of searches and seizures in a twelve month period. Any one of these searches may give rise to a *Bivens* claim. A prison guard will probably not remember the details of one particular search five or ten years after the incident . . . .

Id. at 1517.

In such cases it is important to the defendant's ability to prepare an adequate defense for the action to be brought

without undue delay. This need is not confined to civil rights cases brought in the prison context. The potential liability, including substantial attorney fee awards, to which a defendant is exposed in these types of cases, makes it imperative that defendants not be deprived of what security they may possess in a shorter statute of limitations.

> [A] legislature's selection of differing limitations periods for a claim sounding in defamation and one based on a written contract is grounded in its evaluation of the characteristics of those claims relevant to the realistic life expectancy of the evidence and the adversary's reasonable expectations of repose. (citations omitted) ". . . [C]laims based on conduct, and hence heavily relying on unwritten evidence, should have relatively short statutes of limitations, so as to bring them to trial . . . before memories have faded."

Wilson v. Garcia, supra, at 282, 85 L.Ed.2d at 270.

Because a greater percentage of civil rights cases are brought by prisoners for which few considerations may exist to prevent them from filing false and malicious claims there is all the more reason for ensuring that the interests of defendants to prompt notification of the complaint are retained by pegging the appropriate statute of limitations to those intentional torts which are akin to those which Congress sought to redress by the passage of the Civil Rights Acts, as these are generally shorter in recognition that the plaintiff will have no trouble in recognizing that a violation of his rights has occurred.[2] One

---

[2] *But see,* Ala. Code § 6-2-34 (1975) (six years for trespass to person or liability, including false imprisonment or assault and battery) and Ala. Code § 6-2-38 (1975) (two year catchall provision).

will also have gone a long way in ensuring that there will be a greater likelihood of a fair trial in the majority of cases.

II.

THE ADVANTAGES TO DEFENDANTS AND THE COURTS OF STATE STATUTES OF LIMITATIONS FOR CAUSES OF ACTION MOST RESEMBLING THOSE WHICH CONGRESS SOUGHT TO REDRESS BY THE ENACTMENT OF 42 U.S.C. § 1983 CAN BE RETAINED WITHOUT JEOPARDIZING THE LEGITIMATE INTERESTS OF PLAINTIFFS OR THE POLICY FAVORING COMPENSATION FOR PARTIES WHOSE RIGHTS HAVE BEEN VIOLATED.

Legal doctrines have developed which protect the occasional plaintiff who in the exercise of reasonable diligence still may not have learned of the accrual of a cause of action at the time the statute of limitations has run, such as the exception carved out known as the "discovery rule"[3] and the exception created where one has fraudulently con-

[3]"A problem which has come to the fore in recent years is the not uncommon occurrence of a careful and diligent plaintiff who, at the time his cause of action accrues, is unaware that he has suffered a legally redressable injury and remains unaware of the injury throughout the running of the limitation period. Traditionally, the running of the time period was not tolled by the victim's ignorance concerning his cause of action. . . . A recent judicial intervention created by the courts to alleviate this problem is descriptively referred to as the 'discovery rule.' Under the discovery rule, a cause of action does not accrue and the limitation period begin to run until the wronged party learns of his injury or by the exercise of reasonable care should have learned of it." *The Evolution of Illinois Tort Statutes of Limitations: Where Are We Going and Why?* 53 Chicago—Kent Law Review 673 at 673-674 (1977).

cealed a cause of action.[4] It is not unusual for the statute to specify other occasions when the limitation period may be tolled[5] and courts have created other equitable tolling provisions.[6] "[F]ederal courts have the power to toll statutes of limitations borrowed from state law in appropriate circumstances." *Meyer v. Frank,* 550 F.2d 726, 729 (2nd Cir. 1977) *cert. denied* 434 U.S. 830, 54 L.Ed. 2d 90, 98 S.Ct. 112. The language of 42 U.S.C. § 1988 clearly indicates that if the application of state law would contravene the Constitution or laws of the United States then it should not be applied. Given the above, aggrieved plaintiffs have little, if anything, to lose by the selection of a statute of limitations designed for cases where memories may be fleeting and documentary evidence may be lacking. The one year limitation period sought by the petitioners in the present case is certainly a reasonable time for most plaintiffs to bring an action once the injury has become known. In the special case where that amount of time is insufficient, equitable tolling provisions will likely be available. On the other hand, defendants have much to lose. There may be no way to locate documents which have been destroyed. Witnesses may no longer be available. Memories may have faded long before. In sum, then, what a defendant may lose by the selection of an in-

[4]*United Klans of America v. McGovern,* 621 F.2d 152, 153 (5th Cir. 1980).

[5]*Brown v. Bigger,* 622 F.2d 1025 (10th Cir. 1980) (imprisonment); *Leonhard v. United States,* 633 F.2d 599, 617 (2nd Cir. 1980) *cert. denied* 451 U.S. 908, 68 L.Ed.2d 775, 101 S.Ct. 1975 (1981) (disability because of infancy).

[6]*Pickett v. Brown,* 462 U.S. 1, 76 L.Ed.2d 372, 103 S.Ct. 2199 (1983) (where scientific advances have reduced the need for a short statute of limitations).

appropriate statute of limitations is the opportunity for a fair trial.

That selection of the generally shorter limitation period for intentional torts will protect the defendant's interest in prompt notice of the adversary's claim without harming the legitimate interests of civil rights plaintiffs would seem to make such a course irresistible. And this position has even more to commend it.

III.

THE GOAL OF DETERRING CONSTITUTIONAL VIOLATIONS WILL BEST BE SERVED BY SELECTION OF A STATUTE OF LIMITATIONS NO LONGER THAN IS REASONABLY NEEDED FOR THE INITIATION OF AN ACTION.

Opting for the generally longer limitations periods provided for unintentional torts would tend to detract from the goal sought by Congress through enactment of 42 U.S.C. § 1983. The purposes behind the enactment of the Civil Rights Act would best be achieved by the selection of a limitation period no longer than is reasonably necessary for the commencement of an action.[7] This policy was discussed by the Court in *Wilson v. Garcia, supra,*

---

[7]*But see, Epp v. Gunter,* 677 F.Supp. 1415, 1419 (D.Neb. 1988), where the court selected one of the longer potentially applicable statutes of limitations. This result was in part out of concern for those plaintiffs who may have relied upon the three year statute for actions upon a liability created by federal statutes which was applied pre-*Wilson*. This concern could be addressed by providing a grace period for plaintiffs who had reasonably anticipated that a longer limitation period would apply.

> The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. . . . (citation omitted) By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement.

Id. at 276-277, 85 L.Ed.2d at 266-267. Deterrence of continuing constitutional violations was, and is, the goal. The purposes served by § 1983, then as now, could best be accomplished by prompt enforcement of civil remedies.

> Constitutional abuses cannot be deterred by actions that lay dormant for innumerable years while a federal prisoner serves out his sentence. Nor can they be stopped immediately through injunctive relief if the prisoner waits until he has been released to bring the action.

Hawthorne v. Wells, 761 F.2d 1514 at 1517 (11th Cir. 1985). *See, also, Higley v. Michigan Dept. of Corrections,* 835 F.2d 623, 626-627 (6th Cir. 1987).

Therefore, where a state has multiple statutes of limitations which may apply to personal injury actions, selecting the shorter of them, so long as that period is not unreasonable, would encourage prompt action by plaintiffs and better accomplish the goals of Congress in the passage of § 1983.

CONCLUSION

For states which have a variety of statutes of limitations which may be applicable to personal injury claims, the selection of the shorter limitation period, provided it does not discriminate against federal claims and gives plaintiffs a reasonable time in which to file, best serves the policies behind the enactment of the Civil Rights Act of 1871. It would encourage promptness in the filing of actions and, thus, would promote the deterrent effect sought through the enactment of 42 U.S.C. § 1983. Furthermore, it would accomplish these beneficial ends without harm to legitimate interests of plaintiffs and would protect the important interests of defendants in receiving a fair trial by putting them on notice of the action in time to preserve evidence, identify witnesses, and record recollections.

In light of the foregoing, amici curiae join with petitioners in requesting that this Court select from the potentially applicable statutes of limitations for personal injury actions the one pertaining to the cause of action which most resembles those intentional torts which Congress sought to redress through § 1983.

Respectfully submitted,

THE STATE OF NEBRASKA
ROBERT M. SPIRE
Attorney General
Mark D. Starr*
Asst. Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

THE STATE OF WYOMING
JOSEPH B. MEYER*
Attorney General
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

*Counsel of Record

THE STATE OF ARKANSAS
JOHN STEVEN CLARK*
Attorney General
201 East Markham Street
Heritage West Building
Little Rock, AK 72201
(501) 371-2007

THE STATE OF OKLAHOMA
ROBERT H. HENRY
Attorney General
David Lee*
Asst. Attorney General
112 State Capitol
Oklahoma City, OK 73105
(402) 521-3921

THE STATE OF
SOUTH DAKOTA
ROGER A. TELLINGHUISEN*
Attorney General
State Capitol Building
Pierre, SD 57501
(605) 773-3215

THE STATE OF WISCONSIN
DONALD J. HANAWAY*
Attorney General
P.O. Box 7857
Madison, WI 53707
(608) 266-9945

THE STATE OF
SOUTH CAROLINA
T. TRAVIS MEDLOCK*
Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

THE STATE OF KANSAS
ROBERT T. STEPHAN*
Attorney General
Judicial Center—2nd Floor
Topeka, KS 66612
(913) 296-2215

THE STATE OF MISSOURI
WILLIAM L. WEBSTER*
Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

*Counsel of Record